

1 IN THE UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF MARYLAND

3 UNITED STATES OF AMERICA, )  
4 Plaintiff, )  
5 vs. ) CRIMINAL NO.: JKB-16-0363  
6 GERALD JOHNSON, et al., )  
7 Defendant. )  
8 \_\_\_\_\_ )

9 Transcript of Motions Hearing  
10 Before the Honorable James K. Bredar  
11 Friday, November 3rd, 2017  
12 Baltimore, Maryland

13 For the Plaintiff:

14 Peter J. Martinez, AUSA

15 Christina A. Hoffman, AUSA

16 For Defendant Gerald Johnson:

17 Paul F. Enzinna, Esquire

18 Jeffrey B. O'Toole, Esquire

19 For the Defendant Wesley Jamal Brown:

20 Harry J. Trainor, Jr., Esquire

21 Christopher M. Davis, Esquire

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1 APPEARANCES (Cont'd)  
2

3 For Defendant Kenneth Jones:

4 Alan R.L. Bussard, Esquire

5 For Defendant Marquise McCants:

6 John R. Francomano, III, Esquire

7 For the Defendant Joseph Bonds:

8 David Solomon, Esquire

9  
10 Also Present: Special Agent Lisa Christy, ATF

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## 1 P R O C E E D I N G S

2 THE COURT: Good morning. Be seated, please.

3 Mr. Martinez, you may call the case.

4 MR. MARTINEZ: Good morning, Your Honor. This is  
5 criminal case number JKB-16-0363, United States versus Gerald  
6 Johnson, Wesley Brown, Kenneth Jones, Joseph Bonds, and  
7 Marquise McCants. Peter Martinez for the Government. With me  
8 at counsel table are AUSA Christina Hoffman and Special Agent  
9 Lisa Christy of the ATF. This matter is before the Court for  
10 a motion hearing in connection with recordings taken at the  
11 CDF detention facility.

12 THE COURT: Appearances for Mr. Johnson.

13 MR. ENZINNA: Good morning, Your Honor, Paul Enzinna  
14 and Jeffrey O'Toole for Mr. Johnson.

15 THE COURT: For Mr. Brown.

16 MR. DAVIS: Christopher Davis and Harry Trainor on  
17 behalf of Mr. Brown.

18 THE COURT: Mr. Jones.

19 MR. BUSSARD: Alan Bussard representing Mr. Jones.

20 THE COURT: Mr. Bonds.

21 MR. SOLOMON: David Solomon on behalf of Joseph  
22 Bonds.

23 THE COURT: And Mr. McCants.

24 MR. FRANCOMANO: John Francomano on behalf of Mr.  
25 McCants.

THE COURT: Good morning, Counsel. We have a very focused hearing this morning. This hearing is directed solely at the two late disclosed audio/video recordings that allegedly occurred on September 25 and September 26, inside of the Chesapeake Detention Facility, in a room where the FBI had evidently planted a bug in service of some other investigation, but allegedly picked up two conversations, one on each day, between defendants McCants and Handy, McCants being on trial in this particular case. And the issue that is presented is whether or not these overheard statements are admissible during the trial, admissible during the government's case in chief.

There are other motions in limine pending. We'll address those in the ordinary course at the pretrial conference for next week, which is scheduled for what day?

MR. MARTINEZ: Tuesday the 7th, Your Honor.

THE COURT: Okay. And just as a housekeeping matter, Mr. Bussard, now that Mr. Jones is back in federal custody, I assume we're going to keep him in federal custody?

MR. BUSSARD: I briefly discussed it with Mr. Jones before he entered court and we have a little bit more talking to do. He's going to make a decision whether he stays in federal custody or returns. He has programs down --

THE COURT: Does he have any right to return to state custody?

1 MR. BUSSARD: He is serving a sentence.

2 THE COURT: Yes, I understand that. But if his  
3 presence is needed in federal court now for the adjudication  
4 of the federal charges against him, and he's been brought over  
5 here pursuant to a writ, why should he not remain now in  
6 continuous federal custody until we have completed this  
7 federal matter.

8 MR. BUSSARD: I'm not sure whether the writs are  
9 just specific to today and then next Tuesday or if they are  
10 covering the entire trial.

11 THE COURT: Well, it raises enormous logistical  
12 problems now at this stage for him to be going back and forth.  
13 Especially, given the fact that we've had some late motions  
14 and the Marshals Service literally needed to move heaven and  
15 earth to get your client here today because of just  
16 bureaucratic challenges that are faced when we have a sudden  
17 hearing, as was necessary here.

18 So my strong inclination at this point is to direct  
19 the Marshals to simply keep your client now in federal custody  
20 until the completion of these federal proceedings. Given that  
21 that's my inclination, the Marshals are directed not to return  
22 the defendant to state custody without further order of this  
23 court. In the meantime, Mr. Bussard, and Mr. Martinez, you  
24 should sort out where we stand with respect to a writ, whether  
25 there needs to be some different writ served and alert the

1 Court as to any legal obstacles that stand in the way of what  
2 the Court's intention is at this point.

3 MR. MARTINEZ: Understood, Your Honor.

4 MR. BUSSARD: The only issue I have and I think Mr.  
5 Jones will probably have his -- his property is still there.  
6 If there was some way of securing his personal property at  
7 DOC. I may have to talk to somebody in the Division of  
8 Correction.

9 THE COURT: Right. So yeah, this is a sudden  
10 development and if you need some assistance from the Court in  
11 that regard, please feel free to ask. But in terms of his  
12 actual physical body, I think we're done with moving back and  
13 forth between federal custody and state custody in the run up  
14 to this proceeding, which starts on November 20th and will run  
15 for nine weeks. It's very complicated to do that.

16 So absent, Mr. Bussard, your showing me he's got  
17 some legal right to return to state custody -- and I have an  
18 open mind on that question, I'll consider anything you submit  
19 to me -- but absent that he's going to remain in federal  
20 custody.

21 Okay. As I said, we have this other hearing that  
22 will begin next Tuesday. And it is during that proceeding  
23 that the Court will address the bulk of the motions in limine  
24 that have been filed in this case, as well as other issues  
25 that are appropriate for a pretrial conference. But it became

1 clear when this issue erupted over the last week, that it --  
2 that this issue, with respect to these recordings was unique  
3 and different, and had particular complications that might not  
4 be present with respect to more garden variety motions in  
5 limine.

6 And as a consequence it was the Court's judgment  
7 that this should separately be set in. It also had  
8 implications for the timing for the disclosure of the *Jencks*.  
9 So we've -- we're holding this special hearing on this issue  
10 today. And I hope to get this issue resolved either during  
11 this hearing or possibly shortly after the hearing through a  
12 written ruling.

13 We've got two statements in particular, I appreciate  
14 the briefs that counsel submitted. As I said, there's some  
15 complexity to the issue. Let's turn our attention to the  
16 first tape first, first recording, by that I mean the  
17 September 25 recording.

18 Mr. Francomano, you would agree that if the Court  
19 finds that the statements were co-conspirator statements, that  
20 is statements made during the conspiracy and in furtherance of  
21 the conspiracy, and if the Court further finds that there  
22 is -- that the Rule 403 balancing test does not tip in your  
23 favor, that the statements would be admissible?

24 MR. FRANCOMANO: Yes, your --

25 THE COURT: Do you want to argue Fourth Amendment or

1 Title III issues, or do you want to stand on your submissions?

2 MR. FRANCOMANO: No, I'll stand on all those issues  
3 in our motion. As to the Title III, we're not going to argue  
4 that. We're not going to argue the 801(d)(2)(A) or the  
5 authenticity.

6 THE COURT: Where you really want to fight is on  
7 801(d)(2)(E) and 403; right?

8 MR. FRANCOMANO: Correct, Your Honor.

9 THE COURT: Okay. Is there any other defendant that  
10 wants to be heard in oral argument on topics other than  
11 801(d)(2)(E) and Rule 403? In other words, somebody want to  
12 pick up the flag on the Fourth Amendment or Title III and  
13 argue that?

14 All right. How about any other ground other than  
15 Title III and the Fourth Amendment, except for the  
16 co-conspirator exception and Rule 403?

17 MR. FRANCOMANO: Your Honor, I would also like to  
18 argue 404(b) as well.

19 THE COURT: Okay. You can reserve on that.

20 MR. FRANCOMANO: Thank you.

21 THE COURT: All right. So the -- I don't see any  
22 issue under either the 4th Amendment or Title III with respect  
23 to the placement of this listening device. I don't think that  
24 the defendants, starting with Mr. McCants, and certainly not  
25 anybody else, has standing. So I expect to dispose of that in

1 a written ruling in a manner consistent with that. And no one  
2 has requested argument on that.

3                 Okay. So let's then turn to what I think is the  
4 central issue and perhaps defense counsel have had the  
5 opportunity to confer among themselves about who they request  
6 among themselves take the lead on this, Mr. Francomano, to my  
7 knowledge it's been you.

8                 MR. FRANCOMANO: I have a feeling it will be me,  
9 Your Honor.

10                THE COURT: Okay. So let's go. What have you got?

11                MR. FRANCOMANO: Your Honor, if I could I'd like to  
12 argue both conversations separately.

13                THE COURT: Yeah, one after the other.

14                MR. FRANCOMANO: Yeah, if I can start with the  
15 26th.

16                THE COURT: Why do you want to argue the 26th first?

17                MR. FRANCOMANO: Because I think it has more  
18 potential impact on my client than the 25th.

19                THE COURT: Well, I would prefer you stick with just  
20 the sequence in time.

21                MR. FRANCOMANO: Your Honor we can start with --  
22 that's -- whatever Your Honor would like. We'll start with  
23 the 25th.

24                Your Honor, in the government's motion in limine,  
25 they break it up into different sections and I'd like to

1 address each section they broke it up into as well. Because  
2 there's different sections in which Mr. McCants is talking,  
3 allegedly talking about other things that are going on in that  
4 room. First, there was an issue where he says that the  
5 government alleges that he's trying to smuggle weed into the  
6 jail.

7 THE COURT: Yes.

8 MR. FRANCOMANO: Marijuana into the jail. And he  
9 allegedly says, "I ain't trying to get no bupe," which they  
10 mean to be buprenorphine, "man, I'm trying to get some weed  
11 now." Now, even if we agree he's trying to get weed or bring  
12 weed into the jail, I don't see how any of that has to do with  
13 any of the racketeering charges or it has anything to do with  
14 the BGF or anything such as that, Your Honor. I think it  
15 would be considered 404(b) evidence.

16 THE COURT: There is case law out there that talks  
17 about the fact that if the defendants -- if it's a completely  
18 different conspiracy, but they're in it, it could be  
19 admissible. The problem is that that might, for the  
20 Government, only go as far as Handy and McCants.

21 MR. FRANCOMANO: Well, not only that, Your Honor, we  
22 have to still go through -- if it is not 404(b) and it is only  
23 403(b) evidence, we still have to weigh the probative versus  
24 the prejudice. In this case this is a situation where he is  
25 only -- it's mere idle chatter that he's talking about. He's

1 not actually talking about getting weed. He's talking about  
2 that he would like to have some weed.

3 THE COURT: Let me advance the argument a little bit  
4 by telling you that I'm not particularly persuaded by the  
5 government's theory on smuggling into the prison, and somehow  
6 the BGF -- that that is somehow encompassed in their wider  
7 conspiracy, the racketeering conspiracy. I'm much more  
8 interested in hearing what you have to say about this  
9 government -- about the contention from the government that  
10 conversations that occurred on those days were in the nature  
11 of maintaining, building, cultivating, nurturing, trust and  
12 cohesiveness among the members of the conspiracy, all in the  
13 context of an organization that from other evidence, clearly,  
14 so highly valued those ties and bonds.

15 Why isn't this conversation viewed properly, as  
16 being a continuation of that dimension of the conspiratorial  
17 activity. And thus, in furtherance of that portion of the  
18 conspiratorial activity, by a preponderance of the evidence.

19 MR. FRANCOMANO: Well, Your Honor, as to the 25th,  
20 as I stated before, these are two inmates discussing their  
21 cases. At one point Mr. McCants was allegedly discussing  
22 about the marijuana, and then another point he's allegedly  
23 talking about a revolver. They're not discussing any  
24 advancements in the Black Guerilla Family Greenmount regime --

25 THE COURT: What about your client's alleged

1 reference to the fact that he's not telling.

2 MR. FRANCOMANO: I'm sorry, Your Honor?

3 THE COURT: What about your client's alleged  
4 reference and being picked up, recorded, having said something  
5 to the effect of "I'm not telling."

6 MR. FRANCOMANO: Well --

7 THE COURT: Because, you know, clearly, it seems  
8 from the context, at least the way the government would  
9 present it, it's just reflective of that constant hanging  
10 question who's telling? You telling? Am I going to tell?  
11 I'm not going to tell. Are you going to tell?

12 MR. FRANCOMANO: Well, Your Honor, they're not  
13 saying that if you tell that, you know, I'm going to hurt you  
14 perform some type of violence on you. What he's saying is I'm  
15 not going to say anything, whether or not he's going to say  
16 anything to the government, whether or not he's going to say  
17 anything about the case itself, they're not in furtherance of  
18 the conspiracy --

19 THE COURT: Why is it not perpetuating a culture of  
20 nobody tells on anybody else, stop snitching, whatever  
21 Baltimore vernacular, why isn't that? Why isn't that part of  
22 it?

23 MR. FRANCOMANO: Because he's not telling Mr. Handy  
24 to stop snitching. He's making a statement, I'm not going to  
25 say anything.

1                   THE COURT: But isn't that his providing assurance  
2 that he isn't, and isn't going to, and that he is continuing  
3 to respect and honor the code.

4                   MR. FRANCOMANO: Well, Your Honor, it's also his 5th  
5 Amendment right to not say anything. So, I mean, it can be  
6 taken that way as well, saying I'm not going to say anything  
7 because I don't want to incriminate myself, or it could be for  
8 a thousand different reasons other than --

9                   THE COURT: I think that's an interesting run at a  
10 constitutional issue there, but I don't think that's the --  
11 even close to the best and most logical interpretation of that  
12 comment. I'm not telling isn't I'm not telling on myself.

13                   MR. FRANCOMANO: Well, Your Honor, he doesn't say  
14 I'm not telling on anyone. He says, I'm not telling. And  
15 that's, in that conversation --

16                   THE COURT: People tell they get a benefit for  
17 themselves by testifying against others.

18                   MR. FRANCOMANO: Absolutely, Your Honor. But they  
19 also -- saying I'm not telling could mean in the reference to  
20 a number of other things besides perpetuating the conspiracy.  
21 I don't think that that is something that automatically says,  
22 well, it's in furtherance of a conspiracy saying that I'm not  
23 going to tell, okay. Like I said, he doesn't have to tell  
24 anyone.

25                   THE COURT: No, but the context is, I'm not telling,

1 implying we're having a conversation about who might be  
2 telling.

3 MR. FRANCOMANO: But, Your Honor, that's not the  
4 conversation. There is no conversation of who's telling, I'm  
5 not going to tell. He just says I'm not telling. That's it.  
6 It's not I'm not telling because it's part of a conspiracy,  
7 I'm not telling because -- it's I'm not telling. And like I  
8 said he has a right not to tell.

9 THE COURT: He doesn't have a right to conspire with  
10 others in an overall scheme to create a culture where nobody  
11 tells.

12 MR. FRANCOMANO: And I agree with Your Honor. But  
13 he's not saying I'm not telling, you shouldn't tell either.

14 THE COURT: But isn't that implicit?

15 MR. FRANCOMANO: I don't think so, Your Honor. I  
16 think he is referring only to himself. And he doesn't say  
17 that I'm not telling, you shouldn't tell, the other  
18 co-defendants shouldn't tell. He doesn't say that at all. He  
19 says, I'm not telling, which is his absolute right.

20 THE COURT: All right. What else have you got?

21 MR. FRANCOMANO: Your Honor, as to the 25th, there  
22 is a mention of a revolver and issues with a pistol, things  
23 like that.

24 THE COURT: What about mention -- aren't there some  
25 mentions of his deal or something on the 25th --

1 MR. FRANCOMANO: On Mr. McCants's deal?

2 THE COURT: Or who's that, Mr. Brown?

3 MR. FRANCOMANO: That's not Mr. McCants, Your  
4 Honor.

5 THE COURT: Okay.

6 MR. FRANCOMANO: On the 25th there's reference to a  
7 revolver and that he, I can read it, "I don't F with  
8 revolvers, they got to be 10 shots or better for me to F with  
9 them." This sentence has nothing to do with anything,  
10 basically he's just saying, I don't use revolvers.

11 THE COURT: Why isn't it properly viewed as, you  
12 know, kind of team building. One, you know, idle chatter in  
13 one context, which this might be in some context, in a  
14 different context, in an environment where there is -- that's  
15 infused with this tension about who's going to stay on the  
16 team, who's not going to stay on the team. Are we still  
17 hanging with each other, are we not hanging with each other,  
18 conversations then that go into, you know, what happened to  
19 the gun, you know, who sold it. What happened and then this  
20 starts to slop over into what I want to talk about in terms of  
21 the 26th, you know --

22 MR. FRANCOMANO: His discussing --

23 THE COURT: Why isn't that just the sort of team  
24 building conversations that are occurring not as idle chatter,  
25 but in service of the very important interest of keeping the

1 team together.

2 MR. FRANCOMANO: I don't think that's true at all,  
3 Your Honor. If you listen to the -- I'm sure you have read  
4 and listened to the tapes themselves. He's talking about not  
5 in reference to a shooting, not in reference to anything, but  
6 if he has a gun, allegedly, that he would use a gun instead of  
7 a revolver. That's like any other situation if you were with  
8 two hunters, I like a 12-gauge better than a 10-gauge. It has  
9 nothing to do -- or there's no reference whatsoever into any  
10 type of gang-related activity or saying, hey, you know, Mr.  
11 Handy, you should also use this type of gun too. He's just  
12 making a statement, Your Honor.

13 THE COURT: Unless you indulge the notion that the  
14 whole premise of the whole conversation is, I'm staying tight  
15 with my pals here. And, you know, we're maintaining this  
16 cohesiveness.

17 MR. FRANCOMANO: I respectfully disagree. If he  
18 would have said --

19 THE COURT: Well, I hope you do, because it's your  
20 job. But this is the problem. This is the problem.

21 MR. FRANCOMANO: Right, Your Honor. But I would  
22 agree if he was saying, hey, this is the type of gun that I  
23 use and you should use it too.

24 THE COURT: Yeah, well, that would be worse.

25 MR. FRANCOMANO: Or everybody should do this. But

1 he's not saying that. What he's saying is, allegedly, is that  
2 I would -- I prefer this over this. I prefer chocolate cake  
3 or vanilla cake. I prefer this -- it's not in any type of  
4 context.

5 THE COURT: Two guys are in a eating club together  
6 every month they go out to a different place, to a different  
7 dessert place, now they're sitting around the gym talking to  
8 each other. Yeah, I prefer chocolate cake over vanilla cake.  
9 Well, is that idle chatter or is that somehow connected with  
10 the fact they're in a club together that goes to a different  
11 dessert place every month, or used to.

12 MR. FRANCOMANO: Your Honor, the context is the  
13 whole thing. It could be either, but most likely it's  
14 probably just one guy likes chocolate better than he does  
15 vanilla. And that's my point. There's no way to show that  
16 this is any type of team building, all he's doing is  
17 explaining this is my preference and that's it.

18 THE COURT: Let's imagine that during the course of  
19 the trial the Court makes its own determination, independent  
20 of the jury, that the government has proven that there is a  
21 conspiracy, and that it includes your client and the other  
22 gentleman who are here, and others who are not here. And that  
23 it is the BGF Greenmount set or whatever that -- however it's  
24 going to be referred to. And that there being such a  
25 conspiracy, that the activities of the conspiracy extended to

1 the time when they were locked up, including on the 25th and  
2 26th of September, such that these statements were made during  
3 that conspiracy. And because they were not mere idle chatter,  
4 but instead were conversations that had a purpose to them,  
5 which was to cultivate and maintain the trust and cohesiveness  
6 of the group to hopefully hold it together.

7 Let's imagine that the Court comes to all of those  
8 conclusions. And then, accordingly, is prepared to admit  
9 evidence as co-conspirator statements that tends to ad -- to  
10 show conversations directed at cohesiveness, trust building,  
11 holding the team together and so forth. But then it turns out  
12 that some of those conversations are themselves highly  
13 impactful for other reasons, in that they tend to reflect on  
14 disputed questions like the presence of a gun, the disposition  
15 of a gun, or in the case of the September 26th conversation,  
16 even another murder in the most graphic terms imaginable.

17 Where are we then?

18 MR. FRANCOMANO: Your Honor, then we're at the 403  
19 balancing test. At that point if you're -- if all these ifs  
20 come into play.

21 THE COURT: Right.

22 MR. FRANCOMANO: I think even if it is found to be  
23 relevant and be probative, it is still way too prejudicial for  
24 it to come in.

25 THE COURT: What's prejudicial about it when it's

1 offered in the context of a weeks long, many weeks long trial,  
2 where there is substantial other evidence of what would  
3 otherwise in regular life be considered to be outrageous  
4 behavior.

5 MR. FRANCOMANO: Well, Your Honor --

6 THE COURT: One of the cases I read last night talks  
7 about evidence that somebody committed sexual assault against  
8 their own child, oh, but it's in the context of a case where  
9 he's been charged with multiple sexual assaults on children.  
10 Well, then maybe it's not quite so explosive. It's that  
11 issue.

12 MR. FRANCOMANO: Well, and I did read that case as  
13 well, Your Honor. But the situation we have here is, in that  
14 case they were talking about a sexual assault that occurred.  
15 Okay. In this case we're talking about on the 25th, the issue  
16 is he's talking about a revolver versus a pistol. He's  
17 talking about marijuana. He's not talking about a crime that  
18 he committed. He's talking about basically just those two  
19 incidents. And I don't see how those can come in at a  
20 charge -- a racketeering charge when they have no impact  
21 whatsoever on that. Meaning that they're way too prejudicial.  
22 And I don't think they're probative, to be honest with you,  
23 but in our fact scenario they are.

24 THE COURT: Why don't they just tend to provide a  
25 window on his thinking, his intent, how the -- how he, you

1 know, the tricks of the trade, you know, the methods and the  
2 approaches and tools that he prefers.

3 MR. FRANCOMANO: Your Honor, I don't --

4 THE COURT: In the broader context of an  
5 organization that with some regularity kills people by various  
6 means.

7 MR. FRANCOMANO: Your Honor, I don't believe it goes  
8 to intent or motive or anything such as that. It goes to --  
9 it doesn't really go to anything to be honest with you, it's  
10 just a conversation on the 25th, that has nothing to do with  
11 whether or not he committed any crime, whether or not these  
12 actual conversations have anything to actually do with the  
13 charges here, the racketeering. For them to be even relevant  
14 I think that there's an issue with that. But that's our  
15 position, Your Honor, even if they do come in, they're too  
16 highly prejudicial, they have no impact whatsoever. And the  
17 government can prove the intent with other overt acts that  
18 they've already alleged.

19 THE COURT: So they may not be particularly  
20 probative, they may be somewhat probative not hugely  
21 probative, because there is a lot of other evidence reflecting  
22 on the same subjects, but by the same token, not so terribly  
23 prejudicial either, because there's also lots of other really,  
24 for lack of a better term, nasty proof in this case. In terms  
25 of sully someone's, I don't know, what someone's, you know

1 intentions and mindset seems to be.

2 MR. FRANCOMANO: Your Honor, I understand what  
3 you're saying, is that there are allegedly going to be a  
4 number of murders and things brought out in this case. And  
5 that him talking about a revolver or a gun and marijuana is  
6 not going to be anything that is too prejudicial to him. Is  
7 that correct?

8 THE COURT: Yes.

9 MR. FRANCOMANO: Your Honor, I don't think that's  
10 the standard. I think the standard is whether or not it's  
11 going to influence the jury and have them think of him as,  
12 well, if he's talking about guns and he's talking about  
13 marijuana at the jail, it's probably likely that he did this  
14 other stuff too, so he's guilty. So I think that those two  
15 things would lead a jury to believe, well, you know he did  
16 this stuff so he probably did all the other stuff too.

17 THE COURT: That's a 404(b) type analysis. And I'm  
18 resisting the notion that it's really other crimes, wrongs,  
19 bad acts evidence, and more just a statement from him that  
20 exposes his thinking and intention and beliefs and methods,  
21 tools and approaches, to engaging in the general activity that  
22 is not other crimes, wrongs, bad acts, but this crime, a  
23 racketeering conspiracy.

24 MR. FRANCOMANO: Right and --

25 THE COURT: How he does it.

1 MR. FRANCOMANO: And I would agree with you --

2 THE COURT: You have a big problem here, Mr.

3 Francomano, in how the grand jury has charged it and the scope  
4 of the crime itself. It's not like, well, this bank robbery  
5 is totally different from that bank robbery. And he's not  
6 charged with that bank robbery, he's only charged with this  
7 bank robbery.

8 MR. FRANCOMANO: There's no question that the  
9 racketeering charge is --

10 THE COURT: Racketeering conspiracy.

11 MR. FRANCOMANO: I'm sorry, the racketeering  
12 charge -- conspiracy racketeering charge is large in its  
13 breadth. But at some point, Your Honor, there has to be kind  
14 of a limiting of it. These conversations on the 25th, do not  
15 really show anything or any type of issues where Mr. McCants  
16 is in furtherance or is team building or has tools or has any  
17 type of motivation towards advancing the gang's objectives.  
18 Like I said, I think that those conversations on the 25th  
19 really don't have anything -- any probative value. And I  
20 think that there's no question they're prejudicial.

21 THE COURT: What do you talk openly and frankly  
22 about -- with? Who do you talk openly and frankly with when  
23 the topic is what particular gun you like to use when you're  
24 killing people?

25 MR. FRANCOMANO: Well, Your Honor, I don't think

1 that that ever came in. There was nothing about killing  
2 people. It was I prefer a pistol to a revolver. And they  
3 never --

4 THE COURT: The revolver is a pistol, Mr.  
5 Francomano --

6 MR. FRANCOMANO: I mean, the automatic --

7 THE COURT: Yeah, a revolver as opposed to a large  
8 magazine, semi-automatic handgun. He's not a revolver guy, he  
9 wants more fire power.

10 MR. FRANCOMANO: And that may be true, Your Honor,  
11 but what he says is I prefer -- I do not like revolvers.

12 THE COURT: Yeah.

13 MR. FRANCOMANO: But he never said I prefer to use  
14 them when killing someone. That was never said, Your Honor.  
15 I want to make sure that that's clear.

16 THE COURT: No, that's crystal clear. And the tape  
17 will speak for itself regardless of whether it's crystal clear  
18 to you or me, but there's a context.

19 MR. FRANCOMANO: Like I said, Your Honor, at this  
20 point it is not probative, and it really has nothing to do  
21 with in furtherance of the case itself.

22 THE COURT: Let's talk about the 26th.

23 MR. FRANCOMANO: Yes, Your Honor.

24 THE COURT: And maybe -- and I think it might be  
25 your co-counsel who might want to more address what goes on on

1 the 26th, because your guy's the one making the statement,  
2 we're not really even in a co-conspirator setting there, it's  
3 just is this an admission against his interest.

4 MR. FRANCOMANO: Correct, Your Honor.

5 THE COURT: That's your biggest problem.

6 MR. FRANCOMANO: Do you want me to address that or  
7 wait?

8 THE COURT: Well, I would think you should address  
9 that since you've got the floor.

10 MR. FRANCOMANO: Your Honor, first of all, the 26th  
11 conversation, No. 1, there's no proof that it even happened.  
12 The government makes a number of allegations, they say that  
13 if, you know, if Ronnie is Ronald hall, if --

14 THE COURT: So you're not saying that there's no  
15 proof that the conversation actually happened, you're saying  
16 there's no proof that the murder actually happened.

17 MR. FRANCOMANO: Correct, Your Honor. So there's no  
18 proof whatsoever that the murder happened. Like I say, they  
19 take a number of suppositions to say that this might have been  
20 this person, this might have been Joe, might have been Joseph  
21 Bonds, Moose's little brother, could have been Kevin Evans.  
22 There was somebody that was murdered in Baltimore named Mike.  
23 Your Honor, all of these things taken together do not prove  
24 circumstantially, or otherwise, that a murder even took  
25 place.

1 THE COURT: Well, let's first start with the notion  
2 that it might have been just another one of these team  
3 building conversations and that it might come in for that  
4 purpose. I mean, you could have, I suppose a team building  
5 conversation where the substance of it wasn't even true, it's  
6 just bragging, trying to impress each other, but it still is  
7 probative of the question of whether or not they're in a group  
8 with each other, whether they're united, whether they're  
9 co-conspirators, and directed at trying to promote  
10 cohesiveness. So that would pretty quickly flip it from -- it  
11 would have relevance for that purpose. And then it would be  
12 back to a 403 problem.

22 MR. FRANCOMANO: Your Honor, in that case --

MR. FRANCOMANO: Right. In that case, Your Honor,  
it was a cocaine conspiracy.

THE COURT: Well, cocaine conspiracies and murders are pretty different species.

MR. FRANCOMANO: That's correct, Your Honor. But what they said was that the probative value gained, the proof of the defendant's leadership role is substantially outweighed by the risk of undue prejudice to them bringing that in. And I understand Your Honor's argument that it was not another murder.

THE COURT: I mean, not to be crass, but you know, we -- context is everything. It's just one more murder.

MR. FRANCOMANO: Well, I understand that, Your Honor. But there is another case as well, the Acosta case that is *United States versus Acosta* 181 F.Supp.2d 482. In that the testimony -- the defendant boasted of committing a murder, would have likely -- and would have the likely -- excuse me, the testimony that a defendant boasted of committing a murder would have the likely tendency of leaving at least some jurors to conclude that the defendant had committed that murder. In that case -- there was a murder in that case, Your Honor. So in that situation --

THE COURT: So your view would be that if the government could prove, I don't know by what standard, that this murder actually happened, that would greatly strengthen

1       their argument for its admissibility in this case, even though  
2       it's not specifically alleged as one of the overt acts in  
3       furtherance of this particular conspiracy.

4                    MR. FRANCOMANO: Well, I would, Your Honor, but then  
5        we would have to go back to the 404(b) balancing.

6                    THE COURT: 404(b) or 403?

7                    MR. FRANCOMANO: 404, because it would be other  
8        crimes.

9                    THE COURT: Would it?

10                  MR. FRANCOMANO: I would think so, Your Honor.

11                  THE COURT: Well, they certainly can prove uncharged  
12        overt acts, and to the extent that they prove that the conduct  
13        occurred as part of this conspiratorial activity, it's not  
14        404(b) anymore, it's just an uncharged overt act that's  
15        intrinsic to this crime.

16                  MR. FRANCOMANO: Like I said, there still has to be  
17        the balancing test. And you know, this statement that he  
18        allegedly committed a murder, there's no proof it ever  
19        happened. There's no question it's going to inflame the jury.  
20        Mr. McCants is not charged with committing any murders in this  
21        racketeering conspiracy.

22                  THE COURT: Well, what are the objectives of the  
23        racketeering conspiracy? What are the means and methods? I  
24        think murder. Am I wrong about that?

25                  MR. MARTINEZ: No, Your Honor.

1 THE COURT: So --

2 MR. FRANCOMANO: I understand that, Your Honor. But  
3 what I'm saying is his statements, or his alleged statements  
4 are in reference to a murder that he is not charged with in  
5 this case. So if a jury were to hear these statements --

6 THE COURT: Well, he's charged with engaging in  
7 murder as a means and method, method and means of carrying out  
8 the racketeering conspiracy offense.

9 MR. FRANCOMANO: In the conspiracy, Your Honor, not  
10 substantively.

11 THE COURT: Well, right, but for this purpose,  
12 what's the difference? I mean, lots of other murders are  
13 going to be -- they're going to attempt to prove. And the  
14 Court's certainly not going to prevent that on the theory  
15 that, well, they're not charged with those substantive  
16 murders. Well, they're charged with racketeering conspiracy  
17 where the murders are intrinsic and a part of the means and  
18 methods.

19 MR. FRANCOMANO: But they're not murders that are  
20 charged against Mr. McCants, and that's what I'm saying, if  
21 this conversation were allowed to come in, it is still such a  
22 situation where it is highly prejudicial to Mr. McCants, with  
23 zero probative value.

24 THE COURT: Well, why doesn't it help tend to prove  
25 whether or not he committed murders as a method and means of

1 carrying out the objectives of the conspiracy.

2 MR. FRANCOMANO: Your Honor, as I said, there is  
3 nothing to show that this alleged murder even took place.

4 THE COURT: Well, that's a different point.

5 MR. FRANCOMANO: Yes, Your Honor.

6 THE COURT: And the government, you know, we'll find  
7 out from them in a minute how they intend to otherwise -- it's  
8 not even corroborate -- prove that the murder occurred. All  
9 right.

10 MR. FRANCOMANO: Thank you.

11 THE COURT: Thank you, Mr. Francomano. All right.  
12 I'll come back to the other defendants on the question of --  
13 well, I'll let anybody address 801(d)(2)(E) that wants to, but  
14 I think the more real salient question is what do we do about  
15 the fact -- what do we do in the circumstance, hypothetical at  
16 this point, that I plan to allow the government to introduce  
17 the September 26th statement about the murder and the  
18 twitching and all the horrible stuff against Mr. McCants.  
19 What are your client's entitled to if that is going to come in  
20 during this joint trial?

21 But before we get to that, let's go back to the  
22 government. If you have anything you want to generally say  
23 about the 801(d)(2)(E) conversation that I had with Mr.  
24 Francomano, feel free. But I'm most interested in talking to  
25 you about the September 26th statements of McCants, about some

1       murder that I take it you are rapidly trying to solve perhaps  
2       even as we speak.

3                    MR. MARTINEZ: Your Honor's correct that the  
4       investigation of the murder is ongoing, and just in the last  
5       couple days there have been additional facts uncovered that  
6       tend to corroborate the account Mr. McCants provided. We  
7       learned, for example, that the individual Rondo or Ronnie,  
8       when Mr. Handy asks, you're talking about his residence, which  
9       residence was it, the one on Druid Hill or the one on Barclay.  
10      Ronnie Hall, who witnesses would testify is a BGF member  
11      happens to have addresses at 2357 Druid Hill Avenue and 2319  
12      Barclay. That goes a long way to corroborate that the Ronnie  
13      who's being spoken of in the recorded statement on September  
14      26th is Ronnie Hall.

15                  But getting back to the issue I think the Court is  
16      interested in, do I understand you to be asking about the  
17      prejudicial impact versus probative value of the September  
18      26th --

19                  THE COURT: I want to know whether or not you're  
20      actually going to really be able to otherwise prove that the  
21      murder that you think Mr. McCants was talking about, actually  
22      happened.

23                  MR. MARTINEZ: I believe --

24                  THE COURT: And if it did, was it within -- was it  
25      within the scope of the crime that the grand jury indicted in

1 this case, the racketeering conspiracy.

2 MR. MARTINEZ: I believe we will, Your Honor, and  
3 I'll get to the reasons why in a moment. But I want to put a  
4 marker down here to say that even if we couldn't, the  
5 statements about that murder are still relevant and probative  
6 for the reasons the Court was just discussing with Mr.  
7 Francomano. And that is that this case isn't about individual  
8 racketeering acts, or which murders are charged or uncharged.  
9 The crime charged at least in Count 1 is the agreement. And  
10 the question before the jury is what is the scope of the  
11 agreement.

12 If Mr. -- if the jury decides that Mr. McCants  
13 agreed to be a member of the BGF Greenmount regime, was it --  
14 did he agree that he or some other member of the gang would  
15 commit murders in furtherance of the enterprise. And so the  
16 fact alone that he is in that room discussing with Handy the  
17 details of this brutal murder, goes directly to his knowledge  
18 and intent with respect to the agreement. So even if there is  
19 no further factual development of who the victim was, who the  
20 accomplice was, where the murder happened, et cetera, all of  
21 the questions that Mr. Francomano raises in his motion, the  
22 statement still has immense probative value for the purpose of  
23 showing the scope of Mr. McCants' agreement.

24 Now, with respect to the facts of this particular  
25 murder, there already is substantial evidence that Rondo,

1 Ronnie, is a co-conspirator. Witnesses will testify, have  
2 testified already, that Ronnie Hall is a member of the BGF  
3 Greenmount regime and a member of the gang. Mr. Handy in the  
4 recorded conversation talks about Rondo having an address in  
5 Druid Hill Avenue and Barclay. There are records from MVA and  
6 from search warrants that were executed at the Barclay Street  
7 residence that confirm that.

8 Mr. Handy and Mr. McCants talked about Joe being  
9 involved. There are text messages on Joe's phone with Rondo  
10 and Digga, some of which reference criminal activity,  
11 including going to a gas station to get a mask. All of those  
12 tend to corroborate, and this like I said, Your Honor, this is  
13 still in its early stages, I'm sure there will be further  
14 factual development. But all of those go to corroborate the  
15 notion that Mr. McCants and Mr. Handy were discussing a crime  
16 that actually happened.

17 With respect to some of the other information in the  
18 factual section of the paper we submitted last night, there  
19 was a murder in April, on April 25th of 2016 of an individual  
20 named Michael Tillman. In the conversation Mr. McCants says  
21 the victim's name was a boy named Mike. He also talks about  
22 how the confrontation that precipitated the murder was the  
23 shooting of Rondo's house on Druid Hill, and that they  
24 believed that Moose's brother set it up.

25 This gentleman Michael Tillman was murdered on April

1 25th, of 2016, he was shot multiple times in the neck and  
2 torso. There were seven gunshot wounds in the autopsy.  
3 Witnesses have testified that he had a connection to Kevin  
4 Evans, who is Moose's brother, as well as to Cakes, which is  
5 another name or alias for Ronnie Hall, the Rondo or Ronnie  
6 that's being discussed during the conversation.

7 There's a witness whose account is roughly  
8 consistent with what Mr. McCants describes during the video.  
9 She said she heard one or two gunshots and somebody screaming,  
10 then a bunch of additional gunshots then a car fled the scene.  
11 She also said the shooter got out of the back seat, which  
12 again, is consistent with the narrative that's being  
13 described.

14 But I just want to circle back to the point, Your  
15 Honor, that for purposes of RICO conspiracy, we're not in  
16 Baltimore City Circuit Court, we haven't charged Mr. McCants  
17 with first degree murder. We don't need to prove that murder  
18 happened beyond a reasonable doubt. Just as we don't need to  
19 prove that any of these defendants dealt a gram of drugs.  
20 It's about the agreement. Did they agree -- did Mr. McCants  
21 agree that he or another member of the gang would commit  
22 murder. This conversation shows, unquestionably, of course he  
23 did. It goes to his knowledge and intent with respect to that  
24 agreement.

25 So I appreciate the Court's factual questions about

1 how are we going to be able to develop what happened with  
2 respect to this murder. We will and there will be more  
3 development, but I respectfully submit we don't need to.

4 THE COURT: Thank you, Mr. Martinez.

5 All right. Who else wants to be heard on the  
6 question of these two recordings and the very real possibility  
7 that the government would be permitted to introduce them  
8 during their case in chief. Why -- I see Mr. Enzinna eagerly  
9 bouncing in his chair. Why should they not be broadly  
10 admitted as co-conspirator statements and, therefore, without  
11 restriction or limiting instruction in terms of, you know, who  
12 they can be admitted against?

13 MR. ENZINNA: Your Honor, I'd like to address two  
14 things. First, on the conversation of the 26th. And the  
15 conversation we had in here about how that goes to Mr.  
16 McCants's state of mind and his agreement and scope of his  
17 agreement, et cetera, et cetera. That gets to the part of the  
18 problem here in that there are two ways this stuff can come  
19 in, one is --

20 THE COURT: Two ways?

21 MR. ENZINNA: Two ways these tapes can come in.

22 THE COURT: Yes.

23 MR. ENZINNA: One as co-conspirator hearsay against  
24 everybody, one is as an admission by Mr. McCants, in which  
25 case it was not admissible against everybody. And our

1 clients, including Mr. Johnson, would be entitled at the very  
2 least to a limiting instruction. But the question is when you  
3 have this kind of evidence, this kind of long narrative of  
4 this murder, this uncharged murder that we don't even know  
5 happened and that we don't know the motivation for, we don't  
6 know if it's connected to the conspiracy, that is  
7 extraordinarily prejudicial against people like Mr. Johnson.

8 THE COURT: Is it in the context of the proof that  
9 you know is otherwise going to be offered during the  
10 government's case in chief?

11 MR. ENZINNA: Well, I think is, Your Honor. Because  
12 like I've said, we have no proof that this murder took place  
13 or why it took place or that it had anything to do with this  
14 agreement.

15 THE COURT: What do you mean there is no proof? Mr.  
16 McCants himself says he did it. You're wandering away from  
17 the microphone and your voice is a bit --

18 MR. ENZINNA: I apologize, I'll stay here. The  
19 point is, Your Honor, if Mr. McCants committed a murder that  
20 had nothing to do with this conspiracy, let's suppose for  
21 example he killed his -- somebody who sold him a car because  
22 he didn't like the car. That has nothing to do with the  
23 conspiracy. It may go to the question of whether or not Mr.  
24 McCants was likely to have agreed to commit murders, as an  
25 admission by Mr. McCants. But it does not go to any other

1 defendant in the case, if it has nothing do to do with the  
2 conspiracy. And that brings me to my second point --

3 THE COURT: I don't want to hear that yet. Mr.  
4 Martinez, what about that? What about your responsibility,  
5 what about your obligation to connect the murder to the  
6 conspiracy and how are you going to do that such that I am not  
7 in danger of admitting evidence about an unrelated murder.

8 MR. MARTINEZ: Well, yes, Your Honor. So I think  
9 there are a number of different ways that that can be done. I  
10 think the place to start here from an analytical perspective,  
11 is to recognize that for purposes of the legal standard for  
12 admitting co-conspirator statements, the 4th Circuit has  
13 interpreted the in furtherance aspect of it very broadly. And  
14 Your Honor was touching a moment ago on how statements  
15 meant -- you used a term "team building," I think the cases  
16 refer to fostering trust and cohesiveness, as well as bringing  
17 co-conspirators up to speed.

18 So the first layer here is the conversation between  
19 Mr. McCants and Mr. Handy occurs in the context of a  
20 discussion where before they start talking about the murder,  
21 Mr. McCants assures Mr. Handy "I ain't telling." That goes to  
22 fostering a kind of trust and cohesiveness the Court was  
23 talking about a minute ago. Ronnie is brought up. And Norman  
24 says, "Ronnie's supposed to send me some money." And in the  
25 *Graham case* that we cited in our papers, the 4th Circuit

1 talked about how money owed by one co-conspirator to another  
2 is the type of topic that renders a statement in furtherance  
3 of a conspiracy for purposes of 801(d)(2)(E).

4 THE COURT: Is that money about drugs being sold in  
5 the jail, though?

6 MR. MARTINEZ: No, but we do allege -- so first of  
7 all, and this goes to I think the pendency of the conspiracy.  
8 The overarching premise of the indictment is that BGF is a  
9 prison gang. They -- this Greenmount regime had a presence on  
10 the street. But their conspiratorial activity, the  
11 racketeering activity doesn't cease once they go to jail. And  
12 there's language in the manner and means section about members  
13 of the gang sending money to one another in prison, and  
14 supporting their fellow comrades when they get locked up.  
15 That's the premise of the whole gang.

16 And so when one gang member who's locked up says,  
17 about a gang member who's on the street, Ronnie's supposed to  
18 send me money, that's part of what BGF members do for one  
19 another when one is locked up. That is how this is teed up.  
20 That's the discussion that leads into Mr. McCants's recounting  
21 of the murder. He talks about how it's triggered by a  
22 shooting of Ronnie's house or Ronnie's house was shot up. And  
23 then Joe comes and they go find the guy, they --

24 THE COURT: I was told to get over there, my house  
25 got shot up.

MR. MARTINEZ: Correct. And he's telling Norman about that as a way of bringing him up to speed, as a way of boasting that he came to the aid of a fellow gang member, who is, I will repeat, multiple witnesses can testify during the course of this trial that he was in the regime. In fact, one will testify that he was the person who introduced him to the gang.

We pointed out in our papers how one of the fundamental principles of the gang, one of the 22 rules and 33 constitutions, is that we do not allow harm to come to a comrade without confrontation. That's a foundational principle of this gang. Foundational principle that Mr. McCants agreed to honor, that Mr. Handy agreed to honor. Mr. McCants is telling Mr. Handy what he did in response to the shooting of Ronnie's house. He's saying, hey, look, I'm following the code. It's in the same conversation where he's saying, hey, look, I'm following the code because I'm not telling. So that, in and of itself, Your Honor, is more than sufficient to tie this to the conspiracy that we've charged.

THE COURT: All right. Mr. Enzinna, I'll let you make your second point now.

MR. ENZINNA: My second point actually picks up right there, because Mr. Martinez is talking about the conversation on the 25th. And I'm specifically talking about a part of that conversation that occurs on the third page of

1 the transcript at the very bottom. And that's the part where  
2 Mr. McCants is quoted as saying, "I tell him all the time like  
3 I" --

4 THE COURT: Hold on. Let me catch up. Okay. Carry  
5 over, I got it. Go ahead.

6 MR. ENZINNA: "Man, what the F I'm going to tell  
7 about. For real, what I'm going to tell about? I don't know  
8 shit. Unintelligible. We ain't been together in years. What  
9 I'm going to tell about? Geezy he in all that type of shit.  
10 I can't say nothing about him. Yeah, he J. He that." And it  
11 goes on.

12 Now, Mr. Martinez just argued that what Mr. McCants  
13 said in this conversation was, I'm not telling because I'm  
14 following the constitution. I'm following our gang rules.  
15 But what Mr. McCants is saying here is, I'm not telling  
16 because I ain't got nothing to tell. He's not saying, I'm  
17 doing this as part of a conspiracy. He's not saying, I'm  
18 following our rules. He's saying I've got nothing to tell. I  
19 don't know anything. We haven't been together in years. What  
20 am I going to tell about?

21 Now, whatever piece of this conversation may be in  
22 furtherance of the conspiracy, this particular portion of it  
23 certainly is not. Because what Mr. McCants is saying, is  
24 implying is, if I could tell, I would tell.

25 THE COURT: I don't think that's the fairest

1 interpretation.

2 MR. ENZINNA: Well, he's certainly not saying,  
3 believe me I know stuff, but I'm not going to tell it because  
4 I'm a good BGF member.

5 THE COURT: Well, in those few lines, correct.

6 MR. ENZINNA: Right. So what I'm saying is, now the  
7 question here is admissibility. And the admissibility  
8 question is not decided -- the admissibility question is  
9 divisible in that if one piece of this conversation is  
10 801(d)(2)(E), co-conspirator hearsay.

11 THE COURT: Right.

12 MR. ENZINNA: That doesn't bring the whole  
13 conversation in.

14 THE COURT: Agreed. But --

15 MR. ENZINNA: What I'm saying is that this  
16 particular piece of the conversation is not in furtherance of  
17 the conspiracy and ought to be kept out. Particularly, the  
18 part where it says, "Geezy, he in all that type of shit." And  
19 then it says, "Yeah, he J," because that's extraordinarily  
20 prejudicial to my client.

21 THE COURT: But why isn't that just in the general  
22 context of the team building. We're all talking about each  
23 other. We're all pulling together. We're all sticking  
24 together.

25 MR. ENZINNA: Your Honor with all due respect, that

1       swallows the rule. Because what it means is that if we talk  
2       about anything that has a -- in fact, I think Your Honor used  
3       the word earlier, a connection to the conspiracy, it comes in.  
4       But the rule is not a connection. The rule is not the same  
5       subject. The rule is in furtherance of. You talked about the  
6       eating club and the two people who go to the eating club. And  
7       one day at the gym they're talking and one says I really like  
8       chocolate cake better than vanilla, is that in furtherance of  
9       their agreement of their group?

10           THE COURT: If it's fostering pride in their club,  
11       the argument would be yes.

12           MR. ENZINNA: Well, how is it fostering pride to  
13       say, I'm not telling because I don't know anything.

14           THE COURT: If --

15           MR. ENZINNA: He's saying I am -- he's basically  
16       saying that --

17           THE COURT: Do you have the tape cued up?

18           MR. MARTINEZ: We do, Your Honor.

19           THE COURT: Let's listen to that segment in  
20       particular, so that we -- I can make a judgment as to how  
21       intonation and nonverbal cues express meaning in this  
22       communication.

23           MR. MARTINEZ: So we can certainly do that, Your  
24       Honor. The particular portion in which the statement Mr.  
25       Enzinna just referenced is between 8 minutes and 32 second and

1 12 minutes and 10 seconds.

2 THE COURT: So you have to fish for it is what  
3 you're saying.

4 MR. MARTINEZ: Yes. We're going to fish for it.  
5 But there are other places.

6 THE COURT: Well, while Ms. Hoffman is fishing,  
7 which I hope you're doing or do you need to play it to fish?

8 MR. MARTINEZ: There are other places in both  
9 conversations where this kind of topic is discussed, and in  
10 fact, on September 26th, before the murder is discussed, they  
11 talk about whether any co-defendants are testifying. And when  
12 Mr. Handy confirms his relief that no other co-defendants are  
13 testifying, Mr. McCants says, "yeah, that would be a good  
14 look." So the whole thing is going towards building --

15 THE COURT: All right. I've let you set that sort  
16 of contextual marker for us. But it's really Mr. Enzinna's  
17 turn until we stop for a moment to play the tape. Are you  
18 ready to do that now?

19 MS. HOFFMAN: Sure.

20 THE COURT: Okay. Mr. Martinez, do you have an  
21 image?

22 MR. MARTINEZ: No, I do not.

23 THE COURT: A minute ago there was a image from  
24 inside of CDF.

25 MR. MARTINEZ: Yeah, I think I --

1                   THE COURT: There it is. Do you have it, Ms.  
2 Hoffman? Do you have the image?

3                   MS. HOFFMAN: I think I -- if I play it -- try  
4 playing it now the sound might go.

5                   (video played.)

6                   THE COURT: All right. So let's back up and play  
7 the last 60 or 90 seconds again, please. 60 seconds will  
8 catch it.

9                   (Video played.)

10                  THE COURT: Okay. Mr. Enzinna.

11                  MR. ENZINNA: Your Honor, I apologize, can we hear  
12 that again, I -- I think there may be a mistake in the  
13 transcript.

14                  THE COURT: Why don't you tell me what you think the  
15 mistake is and then we will play it again.

16                  MR. ENZINNA: Well, to be perfectly honest with you,  
17 I have a great deal of difficulty understanding it, but my  
18 client told me that what he heard is different from what the  
19 transcript --

20                  THE COURT: Well how's it going to help me to  
21 relisten to it, I mean, you can listen to it outside of court,  
22 but if you've trying to make a point with me you've got to  
23 proffer to me what it is that you think I should hear that I'm  
24 not hearing.

25                  MS. HOFFMAN: Your Honor, this is a draft

1 transcript. So we're certainly amenable to having these  
2 conversations with defense counsel about changes.

3 MR. ENZINNA: Well, potentially it's extremely  
4 important, because this is the one mention of my client in  
5 here. It's very important that we understand what it's  
6 saying. Because if you read this -- if you look at what we  
7 just listened to, basically what they're talking about,  
8 they're not talking about BGF and the constitution and the  
9 rule that they don't snitch, they're talking about everybody  
10 who is talking.

11 THE COURT: They're talking about what?

12 MR. ENZINNA: They're talking about everybody who is  
13 talking.

14 THE COURT: Uh-huh.

15 MR. ENZINNA: If you look, he says -- if you look  
16 on -- he says, "Some stuff they're saying true, but a lot they  
17 saying ain't true." And then Handy says, "They got a lot of  
18 specific shit, that's how you know Niggas telling."

19 THE COURT: Where are you?

20 MR. ENZINNA: I'm on page 2 of the transcript, about  
21 two-thirds of the way down. After the break in the middle of  
22 the page it's the fourth --

23 THE COURT: Yes.

24 MR. ENZINNA: "They've got a lot of specific shit  
25 that's how you know Niggas telling." Then he says, "That was

1 probably -- like drugs, this whole Country situation. That  
2 was specific."

3 THE COURT: I still haven't found you. "Okay. Like  
4 drugs. This thing, the whole Country situation."

5 MR. ENZINNA: "That was specific." And then McCants  
6 says, "That was probably Chop. He knew all about that. You  
7 feel me?" And then they go on to talk about the possibility  
8 that Chop has been talking.

9 THE COURT: Right.

10 MR. ENZINNA: Cooperating. So this is not a  
11 conversation about, hey, we need to buck up and be tough and  
12 not cooperate. It's about everybody -- people are  
13 cooperating. And McCants is saying, I can't, because I just  
14 don't have any information. He's not saying I would never do  
15 that or I can't do that or I won't do that, he's saying I'm  
16 unable to do that.

17 THE COURT: Well, you can try to sell that  
18 interpretation of it, but that's not mine.

19 MR. ENZINNA: And I believe that what they say  
20 here -- what they say is, "We ain't been together in years."

21 THE COURT: Now where are you?

22 MR. ENZINNA: I'm at the very bottom now.

23 THE COURT: In the same -- "I tell that all the  
24 time, like, I ain't a cooperating man."

25 MR. ENZINNA: Yes. "What am I going to tell about?

1 I don't know anything. We ain't been together in years.  
2 Like, what am I going to tell about?" Then most importantly,  
3 for my purposes, my client says --

4 THE COURT: One thing I note that the transcript  
5 doesn't record in there is the other participant in the  
6 conversation, Mr. Handy, laughing.

7 MR. ENZINNA: Correct.

8 THE COURT: And in a way that suggests, a-ha, that's  
9 a way to sell this. It's about intonation and it's about  
10 interpretation, no question about it, Mr. Enzinna. And I've  
11 got to draw my own best inferences and make my own  
12 interpretation in support of the ruling that I've got to make,  
13 or that I don't make, with respect to the admissibility of the  
14 evidence. I'm telling you, the inference that I draw from  
15 it.

16 MR. ENZINNA: Okay. But it goes on to say, "Geezy,  
17 he in all that type of shit. I can't say nothing about him."  
18 Now, first of all, I don't know that that is correct. I think  
19 that what it may be saying is he's saying they got Geezy as  
20 the head of the indictment in all that shit, which means  
21 something different. So I guess in a -- the jury's ultimately  
22 going to decide what it means.

23 THE COURT: Yeah. And there may well be a  
24 transition in McCant's statements there, that transitions  
25 from, well, I'm not cooperating, which is about the gang

1 rules, but then goes on to, no for real, in the context of  
2 Geezy, I couldn't any way.

3 MR. ENZINNA: Right. But then he goes on to say  
4 that Geezy is in all that stuff and he J. J means BGF.

5 THE COURT: No, he says, Geezy, he in all that type  
6 of stuff, shit, question mark. I can't say nothing about  
7 him.

8 MR. ENZINNA: Yeah, he J.

9 THE COURT: Yeah, he J. He that.

10 MR. ENZINNA: So what he's saying there is that --

11 THE COURT: That he's not implicating your client.

12 MR. ENZINNA: He sure is, he says "he J," J is BGF.  
13 J is jamaa, which stands for BGF.

14 THE COURT: What is Geezy?

15 MR. ENZINNA: Geezy is Mr. Johnson's street name.

16 THE COURT: Yeah. "Geezy, he in all that type of  
17 shit, question mark, I can't say nothing about him. Yeah, he  
18 J. He that." Well, if he is saying J is BGF, then the  
19 statement immediately preceding, I can't say nothing about  
20 him, takes you right back into the place where we have been,  
21 and why can't he say, he just said that he knows that he is  
22 BGF. I can't say nothing about it, then it must be because of  
23 the rules. That's an inference that is reasonably drawn from  
24 it all.

25 MR. ENZINNA: Your Honor, with all due respect, I

1 think that is an unreasonable inference, because what he says  
2 is we ain't been together in years. We ain't been together  
3 for so long. He's not saying I can't talk -- say anything  
4 about Geezy because of the rules. He's saying I can't say  
5 because I don't know anything. Why would he say --

6 THE COURT: What did you mean a second ago when you  
7 were saying that, yeah, he J, he that.

8 MR. ENZINNA: Uh-huh.

9 THE COURT: He J, he that. And you told me that  
10 means that's McCants saying that J is BGF.

11 MR. ENZINNA: Correct. How is that in furtherance  
12 of the conspiracy?

13 THE COURT: Well, he's -- it's in the general  
14 context that we've been discussing all day.

15 MR. ENZINNA: Again, in the context of a rule that  
16 is not even a rule. Because, again, it's saying that anything  
17 that touches on the conspiracy is admissible. And that's not  
18 what the law is. The law is it has to be in furtherance. And  
19 for him to say --

20 THE COURT: Yeah, but you're missing the premise on  
21 which I am proposing it is appropriate to operate here. And  
22 that premise is that a conversation that has a team building,  
23 trust building, cohesiveness enhancing quality to it, is  
24 itself an act that is in furtherance of the conspiracy,  
25 because the way the conspiracy is charged, No. 1, and No. 2,

1 because of the ample other evidence that indicates that that  
2 that code of loyalty and absolutely fealty to each other is at  
3 the center of the conspiracy, the organization, how it  
4 operates, its expectations, its rules, its constitutions, it's  
5 22s and 33s.

6 MR. ENZINNA: Well, where in the conversation is  
7 there a reference to the code, the constitution, the rules  
8 or --

9 THE COURT: It doesn't all have to be in this  
10 particular conversation. The Court's entitled to take into  
11 account the broader context. And all of this assumes that the  
12 government is actually going to prove up the existence of the  
13 Black Guerilla Family, this particular set, the existence of  
14 the rules, et cetera. It isn't all set out in this particular  
15 conversation. And I'm making assumptions about what the  
16 government will prove. But I think those are prudent  
17 assumptions, in light of the proof that we've all previously  
18 been exposed to. And all this is subject to counsel arguing  
19 at the conclusion of the government's case that the  
20 assumptions that the Court made about what was going to be  
21 proven actually never happened.

22 MR. ENZINNA: But, Your Honor, we are -- the  
23 point --

24 THE COURT: I have to make some gatekeeping  
25 decisions up front about whether I'm going to allow them to do

1 it in the first place. And what we don't do, you're old  
2 enough to remember *United States versus James*, and what was  
3 the 5th Circuit's thinking about what needed to be done before  
4 co-conspirator statements could come in and so forth. That  
5 stuff didn't -- I don't think the 4th Circuit ever embraced  
6 it, there were circuits beyond the 5th that did. And then it  
7 completely fell out of favor in the late 80s. We don't have  
8 minitrials and prove the conspiracy before the judge first.  
9 It is all subject to being connected up.

10 And that should be implicit. And the record should  
11 be clear that it's implicit in my thinking with respect to  
12 this. I still have this gatekeeping function of whether I'm  
13 going to let them start down the road.

14 MR. ENZINNA: Right. And that great keeping  
15 function requires that the Court review the statement that's  
16 supposed to come in, and draw reasonable inferences from that  
17 statement about whether it is in furtherance of the  
18 conspiracy, not whether it touches on the conspiracy or is  
19 connected.

20 THE COURT: Agreed. It has to be in furtherance.

21 MR. ENZINNA: And you have a conversation where  
22 these guys are talking and they assume that they are not being  
23 observed, and so we can assume that they're being honest with  
24 each other. And they're having a conversation about people  
25 cooperating with the government. And nowhere in here did they

1 say, you can't do that because of our rules. I won't do that  
2 because of our rules.

3 THE COURT: Right. I understand your argument, Mr.  
4 Enzinna, what I'm telling you is that the whole situation  
5 more -- this conversation in the context of all of the other  
6 evidence that's presented, creates a wider context, which is  
7 you never can cooperate, you never can testify. And what this  
8 is, is a conversation down around the margins about how are we  
9 going to implement that rule and follow that policy in the  
10 context of the particular details that we're aware of with  
11 respect to particular individuals, including to some extent  
12 ourselves, people who are around us and so forth.

13 You're right, it does require the importation from  
14 other evidence and information gathered in this case, this  
15 broader context of there's a rule, there's a code that you  
16 can't cooperate. And then from that, the extension to the  
17 notion that this is the execution of that rule. This is a  
18 conversation about how to implement it in this context.

19 MR. ENZINNA: Your Honor, with all due respect, it's  
20 not at all about the implementation of that rule. It is about  
21 the people who are violating the rule and the fact that this  
22 particular speaker can't violate it, because he doesn't know  
23 anything.

24 THE COURT: Why isn't the violation of the rule a  
25 conversation about the rule?

MR. ENZINNA: It is not a conversation about the implementation of the rule, about how are we going to implement it. It's a conversation where the speaker says all these people are doing this. And I would do it too if I could, but I can't, because I don't know anything.

THE COURT: All right.

MR. ENZINNA: That's exactly what he says.

THE COURT: I hear your interpretation of it. It's not mine. Where else are we going with this?

MR. DAVIS: Your Honor, I'm just going to join everyone's argument with respect to everything that doesn't directly have to do with me. Does Your Honor want to hear from me on the things that --

THE COURT: Yes. I think you probably have some specific concerns.

MR. DAVIS: I do. And if Your Honor's inclined to admit it, I'm prepared to address it.

THE COURT: You should operate on the assumption that I'm inclined to admit it. I'm not going to rule during this hearing. I'm going to rule in writing. It's complicated and I think that it requires a nuanced ruling.

MR. DAVIS: Well, in addition to the arguments contained in our pleading, I would point out that Mr. Brown -- the representations regarding what Mr. Brown said, none of them indicate that he's plotting anything. None of them

1 indicate that he's targeting witnesses or trying to decide  
2 who's going to -- who has testified or who has cooperated  
3 before --

4 THE COURT: Let's get zeroed in on the portion of  
5 the relevant transcript that is relevant to your client and  
6 your concerns.

7 MR. DAVIS: That's contained in my pleading,  
8 document 380, I think I pulled them out.

9 THE COURT: Walk me back through it. Are we in --  
10 let's see are we in the 25th or the 26th?

11 MR. DAVIS: We're on the 25th. And the first thing  
12 we start out with is at page 2, 8:32 to 12:10, the first  
13 couple of sentences. "Wes got" --

14 THE COURT: "Wes got offered 40 then 30."

15 MR. DAVIS: Yes. I would indicate -- I would argue  
16 to the Court that that -- there's no way in the world that  
17 that can be indicative of being in furtherance of the  
18 conspiracy.

19 THE COURT: How is that admissible, Mr. Martinez?

20 MR. MARTINEZ: Your Honor, this is the lead in to  
21 the discussion that actually we just played, in which they  
22 talk about who's violating the rule. And Mr. McCants assisted  
23 he's not going to. But to the extent Mr. Davis is raising an  
24 objection to the negotiations between the government and his  
25 client regarding a plea, I think that's reasonable. I think

1 we're prepared to concede that that doesn't come in and can  
2 redact it from the transcript. It won't be part of the  
3 excerpt played to the jury.

4 THE COURT: Okay. Let's make sure that when we  
5 start excising the tape, that we are faithful to this.  
6 Because I don't want anything in this tape played in front of  
7 this jury about Mr. Brown's deal.

8 MR. MARTINEZ: Understood, Your Honor. I think  
9 that's a reasonable concern.

10 THE COURT: Starting off, Mr. Davis, we've got  
11 "McCants: Wes got offered 40 then 30." That line is stricken  
12 on the motion of Defendant Brown.

13 MR. DAVIS: And I think that also includes the  
14 second line, "He said he trying to get" --

15 THE COURT: "Handy: Yeah, he said he's trying to  
16 get 15. He said he got all the -- he said he got all the way  
17 to 15, he'll take it." That's gone too. And that comes out  
18 because it's -- I find it's either over the line or  
19 dangerously close to the line of intruding on a dimension that  
20 Mr. Brown is entitled to have kept from the jury. They're not  
21 entitled to know -- if he was in such a conversation, who  
22 knows if it's true, but even if he was they're not entitled to  
23 know about that.

24 Okay. Now, I think we're done with the deal, Mr.  
25 Davis, at the very next line, some shit they saying true, but

1 a lot of shit saying ain't true --

2 MR. DAVIS: Well --

3 THE COURT: And --

4 MR. DAVIS: After we deal with the two lines that  
5 Your Honor just said, and the United States conceded they're  
6 not going to use, then we flip over to the second to the last  
7 page, beginning at 32:07 and 33:30.

8 THE COURT: Hold on. Yes.

9 MR. DAVIS: "That's what he got found guilty for,"  
10 they're talking about Mr. Brown now.

11 THE COURT: Right.

12 MR. DAVIS: Now first going back to the comments  
13 about the plea, if a -- these are nontestimonial statements.  
14 So under *Crawford* they come in, if they come in under firmly  
15 rooted hearsay exception. And here the United States is  
16 relying on the co-conspirator hearsay exception.

17 THE COURT: Right.

18 MR. DAVIS: I would submit that the fact Mr.  
19 Brown --

20 THE COURT: Wait a minute, why are you talking about  
21 that, we already took those out?

22 MR. DAVIS: I know. We already took those -- well,  
23 actually all these statements are nontestimonial, so they all  
24 have to come in under the -- but the reason I'm bringing that  
25 up is if he's talking about pleading guilty --

1 THE COURT: Right.

2 MR. DAVIS: -- according to the people that are  
3 talking there, and then when you go to 32:07 and 33:30 he's  
4 talking about all the reasons that he's pleading guilty. I  
5 don't -- I think that amounts to an affirmative step to  
6 withdraw from the conspiracy based on the evidence that the  
7 United States has in the transcripts. I mean, he's pleading  
8 guilty, this was --

9 THE COURT: You think it does amount to an  
10 affirmative step to withdraw from the conspiracy.

11 MR. DAVIS: I do, certainly. I think he's out.  
12 He's talking about pleading. He's going to plead and he's  
13 going to plead because -- and then he goes through, according  
14 to them, they start reciting the evidence that's in the  
15 indictment and in the discovery. I mean, everything in these  
16 statements, later on, is in discovery, it's in the indictment,  
17 it's -- so I mean, I think that is an affirmative step on Mr.  
18 Brown's behalf to withdraw from the conspiracy, based on the  
19 evidence that we have before us --

20 THE COURT: Well, that's an interesting theoretical  
21 question. Are you necessarily withdrawing from a conspiracy  
22 when you plead guilty to some reduced version of it and get  
23 some disposition? I mean, is it theoretically impossible that  
24 someone is still a member of the Black Guerilla Family, still  
25 interested in punishing people who have broken the rules and

1 the code and so forth by agreeing to testify and so forth,  
2 even though you are yourself pleading guilty.

3 MR. DAVIS: Well, in the absence of anything to  
4 indicate as much, I think yes, I think that is an affirmative  
5 step to get out. There's nothing else to indicate that he was  
6 staying in. According to the two individuals that are having  
7 this conversation --

8 THE COURT: Fair enough. But does it really tell me  
9 that he's getting out?

10 MR. DAVIS: Well, if he's pleading guilty, and he's  
11 pointing out why, what indicates he's going to stay in? I  
12 mean, there's nothing. You can't hold him in with nothing.  
13 But you've got to give him credit for taking the affirmative  
14 step to get out. Pleading guilty isn't in the BGF --

15 THE COURT: Getting out is I don't want to be in  
16 this gang anymore that kills people and sells drugs. That's  
17 getting out of a conspiracy. They got me on this one, and I'm  
18 going to have to plead on this one, and I'm going to have to  
19 do some time on this, you know, I'll do the ten years standing  
20 on my head, whatever, we can make up all kinds of stuff, that  
21 doesn't mean you're not necessarily still in the group.

22 MR. DAVIS: We would submit that is an affirmative  
23 step to withdraw from the group in the absence of anything --

24 THE COURT: What is then? The -- but he didn't  
25 plead guilty.

1                   MR. DAVIS: We haven't gone to trial yet. I mean,  
2 we're here --

3                   THE COURT: Well, if he pleads guilty and we don't  
4 go to trial, then you know what, I'm going to concede to you  
5 Mr. Davis.

6                   MR. DAVIS: Well, let's move on from the conspiracy.  
7 Let's move on from the conspiracy. I -- the plea is out, what  
8 we're left with now is on the second to the last page,  
9 beginning at 8:32 going through 12:10.

10                  THE COURT: Okay. Hold on --

11                  MR. DAVIS: Oh, no, I'm sorry, I read the wrong  
12 numbers 32:07 to 33:30, the last two pages. I'll give Your  
13 Honor a second to scan that.

14                  THE COURT: Okay. This is McCants and Handy again,  
15 hold on. Okay.

16                  MR. DAVIS: Now, with respect to this, this is all  
17 about the murder that Mr. Brown was charged with.

18                  THE COURT: Are we talking about Malone?

19                  MR. DAVIS: That is correct. And Brown would submit  
20 that everything that's contained in this conversation between  
21 Handy and McCants, is basically a rehash of the state case and  
22 the evidence that came in during the state case, the discovery  
23 that we've received here in this case, which Mr. Brown has  
24 reviewed every bit of it. And the only thing that's different  
25 is the speculation about who might testify. But there is

1 nothing indicating that anyone's being targeted. There's  
2 nothing indicating that anything nefarious is going to happen  
3 to anyone if they testify. There's just a comment there, I  
4 believe at the end --

5 THE COURT: So you're -- the thrust of what you're  
6 trying to argue to me right now is another argument of not in  
7 furtherance.

8 MR. DAVIS: That is it, yes. It's not in  
9 furtherance. It's just a rehash of everything everyone knows.  
10 And actually, it's not that accurate, as I look at it. I  
11 mean, the reference to they got a text message from Country,  
12 that's not even accurate. It's not only a rehash of the  
13 evidence, the indictment, and the discovery that everybody has  
14 had access to, it's mixing it up. And I just don't think any  
15 of that, it's all retrospective, it's not prospective.

16 THE COURT: Right.

17 MR. DAVIS: And I don't think that these amount to  
18 in furtherance of the conspiracy. And speculation on a  
19 defendant's part about who's going to testify against him, how  
20 can that be in furtherance of the conspiracy. I mean, aside  
21 from -- privilege aside, if my client and I sit down and we  
22 talk about who we expect is going to testify against him, is  
23 that in furtherance --

24 THE COURT: As has probably become clear to you and  
25 your colleagues on your side of the courtroom, the

1 breakthrough moment for the Government came in my shifting my  
2 view about what was really going on between McCants and Handy  
3 in these conversations. And the big shift that's happened for  
4 me, which I'll own completely, is that I have started to buy,  
5 and am largely buying into the notion that a critical thing  
6 that's going on here is the affirming and nurturing and  
7 building of solidarity between McCants and Handy, in the  
8 context of their membership in the wider gang.

9 And that's -- and once -- once the Court goes over  
10 the top of that mountain, becomes a very hard problem for your  
11 side in terms of trying to knock pieces out of it. Because  
12 it's all in the -- yeah, it's a retrospective conversation,  
13 absolutely, but retrospective conversations in the case are  
14 legion, where retrospective conversations to bring everybody  
15 up to speed and what the gang's been involved in, so forth.  
16 That can absolutely be admissible under the co-conspirator  
17 exception.

18 It's just got to be that -- what I thought the  
19 government was missing previously, but now don't feel so  
20 strongly, is that they weren't spending enough time and energy  
21 focusing on whether or not the conspiracy is still alive and  
22 still going. And it's this notion of sort of keeping up the  
23 spirit of the team, building the team, keeping track of, you  
24 know, not just keeping track of who's still in the team, but  
25 affirmatively conversing with each other in such a way as to

1 promote that cohesiveness and loyalty to the gang and to the  
2 organization, that I am concluding is continuing  
3 conspiratorial activity.

4 MR. DAVIS: Well, unfortunately, to Mr. Brown, an  
5 individual who, according to those two individuals that Your  
6 Honor has characterized as being actively involved in the  
7 gang, has indicated, according to them, that he's pleading  
8 guilty and he's getting out. And then when I look at the  
9 statements at the end that the United States is trying to get  
10 in against Mr. Brown, it is all a rehash of the discovery. It  
11 may not even be coming from Mr. Brown.

12 I'm looking at the last page, "But they saying they  
13 got Wes on the phone trying to get rid of the gun he shot such  
14 and such in the head with." That's in the indictment. It's  
15 in the discovery. It's in the lead cooperator that testified  
16 against Mr. Brown, his hours-long videotaped statement. All  
17 of this. Eggy, everything is in there. And it's, you know, I  
18 guess I should shift to the 403 argument at this point in  
19 time --

20 THE COURT: Well, I think you have to. Because I  
21 think that it's -- otherwise it's admissible because they're  
22 talking about what they're up against and kind of buoying each  
23 other's spirits and keeping things moving ahead and keeping  
24 the group together. We're not defeated yet.

25 MR. DAVIS: Were they direct statements from Mr.

1 Brown, that were only attributed to Mr. Brown, that were not  
2 generally made available --

3 THE COURT: Yes.

4 MR. DAVIS: -- to these two men that are the  
5 speakers in this case, through discovery, through the  
6 indictment, through every means that they could have --

7 THE COURT: That's a 403 argument, that is -- you  
8 are stuck with the co-conspirator exception.

9 MR. DAVIS: Well, I'm in 403.

10 THE COURT: All right. We're in 403, because I  
11 don't think you're beating the co-conspirator argument on that  
12 theory. Now, the question is what's unfair about this, what  
13 is unfair in a prejudicial sense?

14 MR. DAVIS: Well, everything that they're talking  
15 about is available to them from a source other than Wesley  
16 Brown.

17 THE COURT: How about this point, why do they need  
18 much more evidence to show that they're all in the gang with  
19 each other?

20 MR. DAVIS: Well, that's definitely --

21 THE COURT: It's kind of cumulative.

22 MR. DAVIS: Well, it's certainly cumulative, because  
23 as I just said, everything they're talking about is in the  
24 indictment and in the discovery --

25 THE COURT: That's not going to be an argument that

1 causes me to knock out both of these statements, but when we  
2 start getting into things like deals, pleas, stuff like that,  
3 and it starts to have kind of a smelly prejudicial dimension  
4 to it --

5 MR. DAVIS: I think it's unfairly prejudicial.

6 THE COURT: We start to weigh it against the  
7 cumulative aspect of it.

8 MR. DAVIS: It's cumulative. There's No question  
9 it's cumulative. It's misleading, because it's not coming  
10 from Mr. Brown directly, it's probably coming from the  
11 evidence. And there's no allegation that all of this is  
12 coming directly from Mr. Brown. And it's just unfairly  
13 prejudicial, given the fact that it's misleading and it's  
14 cumulative.

15 THE COURT: Thanks, Mr. Davis.

16 Mr. Martinez. Why do you need it?

17 MR. MARTINEZ: Well as to --

18 THE COURT: I know why you want it, but why are you  
19 entitled to it?

20 MR. MARTINEZ: As to the discussion about the murder  
21 of Moses Malone and the details --

22 THE COURT: Are we talking about the 32:07 to the  
23 33:30 segment in particular?

24 MR. MARTINEZ: Yes, Your Honor, that's exactly what  
25 I'm talking about.

1                   So a couple of things, first, not all of this  
2 information is coming from the discovery or the indictment,  
3 certainly the names of the individuals being discussed; egg, Deandre, those aren't things that were disclosed in discovery.  
4 There were text messages between Mr. Brown and Egg disclosed  
5 during discovery, but there wasn't anything disclosed that  
6 said Egg's the one that got rid of the joint. That's the  
7 defendants filling in the gaps.

8                   THE COURT: Hold on. Hold on, where is this?

9                   MR. MARTINEZ: This is on page 3.

10                  THE COURT: The last page?

11                  MR. MARTINEZ: Yeah, the last page. But --

12                  THE COURT: I want to go over -- where's the joint  
13 thing? Oh, yeah, Egg got rid of the joint.

14                  MR. MARTINEZ: And then McCants says, "Yeah, he got  
15 rid of it to Deandre." And I can assure the Court that the  
16 name Deandre does not appear anywhere in our discovery.  
17 That's actually showing the independent knowledge that Mr.  
18 Handy and Mr. McCants have of this crime. And it proves up,  
19 it corroborates the notion that the crime was committed for  
20 the gang. But the most important point I want to come back --

21                  THE COURT: But this is admissible at this point,  
22 because it shows that they're still talking to each other,  
23 that they're building the team, that they've got solidarity  
24 with each other and so forth. You've already got a lot of

1 that.

2 MR. MARTINEZ: No, I appreciate that, Your Honor.

3 But I want to get back to the question of cumulativeness.

4 THE COURT: Yes.

5 MR. MARTINEZ: And I think the key point here  
6 emerges at the beginning of the discussion we're talking  
7 about. Where they're talking about how Mr. Brown beat the  
8 bodies in state court. And how Nod was all the evidence they  
9 had. Nod's testified before, he's been outed, so we can talk  
10 about this. At the state trial the witness known as Nod came  
11 forward and said that in the days following the murder of  
12 Malone, Mr. Brown came to him and said, hey, I need to get rid  
13 of a gun that's dirty, because I used it to shoot a witness  
14 who was testifying against Norman. State prosecutors didn't  
15 have much if anything to corroborate that statement and Mr.  
16 Brown was acquitted. And so one of the keys --

17 THE COURT: Are you prepared to say whether or not  
18 he's going to testify in our trial.

19 MR. MARTINEZ: Yeah. We do expect to call him.

20 THE COURT: Okay. And you expect him to say the  
21 same thing?

22 MR. MARTINEZ: We do. One of the key disputed  
23 issues with respect to the murder, is going to be the extent  
24 to which that witness is credibility, and the extent to which  
25 his account is corroborated. And so that's where the text

1 messages with Eggy come in, because they corroborate the  
2 notion that Mr. Brown is trying to get rid of the gun. That's  
3 where this conversation comes in, because it makes clear that  
4 that's in fact what happened. And so we fully expect that --

5 THE COURT: All right. But how is this conversation  
6 in furtherance of that part of the conspiracy? I understand  
7 that this conversation is in furtherance of the other part of  
8 the conspiracy, which is to keep the team together, promote  
9 solidarity, stick to the rules, don't rat anybody out, et  
10 cetera. But now we're looped back to it being introduced as  
11 direct proof on some other aspect of the conspiracy, which is  
12 what happened to the gun, how was the murder done and so  
13 forth.

14 How is this conversation that McCants and Handy are  
15 having in furtherance? It's not the question of whether or  
16 not getting rid of the gun was in furtherance of the  
17 conspiracy, clearly it was. But that's not the question. The  
18 question on the admissibility of this statement is whether or  
19 not this conversation at CDF was in furtherance of the  
20 conspiracy. Now, it was in furtherance of the team building  
21 part of it.

22 MR. MARTINEZ: Well, I think, Your Honor, the  
23 purpose or the manner in which a particular statement furthers  
24 the conspiracy doesn't, under the law, limit -- once it comes  
25 in as a co-conspirator statement, if Your Honor decides this

1 statement was in furtherance of the conspiracy, because it was  
2 team building or because it was intended to foster  
3 cohesiveness --

4 THE COURT: I think you're technically right about  
5 that, but I don't think that's the end of the analysis,  
6 because I still have a 403 decision to make. And knowing that  
7 I only let it in because it got in through this back door  
8 about team building, and yet it ends -- it's of limited  
9 probativity on team building, because you've already got a  
10 whole bunch of evidence, included elsewhere in these  
11 statements that show that they're still building the team. It  
12 just doesn't add that much more, but whoa, on this other  
13 element it's, you know, it's a pretty powerful piece of  
14 evidence.

15 MR. MARTINEZ: But I don't --

16 THE COURT: So does the prejudice analysis, you  
17 know, how does 403 work in this specific context? Is it -- do  
18 I stop making the prejudice analysis once I've ruled that it's  
19 in?

20 MR. MARTINEZ: No. I think that Your Honor rules  
21 that it's in because it's in furtherance of the conspiracy for  
22 the purpose you just described. And then we put 801(d)(2)(E)  
23 to the side, and we say we're operating under Rule 403 here,  
24 what is the probative value of the statement. And the weight  
25 that you assign to the probative value --

1                   THE COURT: So in the prejudice analysis, I  
2 shouldn't be anymore thinking about the door through which it  
3 came in?

4                   MR. MARTINEZ: Correct.

5                   THE COURT: It's in.

6                   MR. MARTINEZ: It's in.

7                   THE COURT: Now, is it somehow unfairly prejudicial?

8                   MR. MARTINEZ: Yes. And --

9                   THE COURT: All right. I got that part. Who wants  
10 to take that on? Mr. Davis?

11                  MR. DAVIS: Your Honor, I just want to kind of put  
12 this into context. We're talking about a cooperator by the  
13 name of Cornish. Now, I may be speaking out of turn, but I  
14 just reviewed his videotaped statement that he gave. Let's  
15 put Mr. Cornish into perspective. After the murder, period of  
16 time after the murder, Cornish gets arrested with drugs. And  
17 the police offer him an opportunity not to go to jail. So he  
18 signs on as a confidential informant and he's working with the  
19 police. He tries to buy the gun from Mr. Brown that the  
20 United States is alleging was used in the murder of Malone.  
21 He's trying to -- he's doing this via text messages, all this  
22 is in the indictment.

23                  THE COURT: He's doing this as a cooperator?

24                  MR. DAVIS: As a cooperator. He's trying to get the  
25 gun. Now, when he gets arrested for the drugs, he sits down

1 and he tells the city police, hey, Brown did the murder. He  
2 admitted to the murder to me. He tried to -- I tried to get  
3 the gun from him but --

4 THE COURT: So he's buying the gun, he wasn't a  
5 government agent.

6 MR. DAVIS: Oh, he was. He was. He was a  
7 government agent then. And here's where it gets even more  
8 interesting, Eggy --

9 THE COURT: How does he get arrested after he's a  
10 government agent?

11 MR. DAVIS: No, he gets arrested and becomes a  
12 government agent. And then he tries to start gather  
13 information on this murder. He tells them --

14 THE COURT: Yeah, but when did he try to buy the  
15 gun -- allegedly when did he try to buy the gun --

16 MR. DAVIS: Few days after the murder.

17 THE COURT: Was he then an active cooperator?

18 MR. DAVIS: He was.

19 THE COURT: So he was trying to buy the gun at the  
20 behest of the police?

21 MR. DAVIS: Yes.

22 THE COURT: And then he was arrested subsequent to  
23 that.

24 MR. DAVIS: Well, yeah, actually he was, but that  
25 really doesn't have anything --

1                   THE COURT: But he had been arrested prior to this  
2 as well.

3                   MR. DAVIS: That's when he decided to become an  
4 informant. And he gave a videotaped statement. And he tells  
5 the authorities that I tried to buy the gun from Wes, this was  
6 before -- he tells them that he tried to buy the gun from Wes,  
7 this is after all this occurred, and he's doing this videotape  
8 statement. He says he tries to buy the gun from Wes, but  
9 Wes --

10                  THE COURT: Referring to when he was trying to buy  
11 it for the police?

12                  MR. DAVIS: Yes. And then he mentions Eggy. Well,  
13 Eggy is his brother. And he tells on Eggy. And I believe  
14 Eggy references Dre, which is Deandre's name. Dre is Deandre.  
15 So all of this is a rehash. None of this necessarily comes  
16 directly from Mr. Brown. It's all a rehash of what is in the  
17 discovery, what is in the discovery both in the state case and  
18 in the federal case. And it's just -- it's not in furtherance  
19 of the conspiracy, because it's just a rehash of what had  
20 happened before --

21                  THE COURT: But we already got past the furtherance  
22 issue.

23                  MR. DAVIS: And it's cumulative to let this in. And  
24 the reason it's a problem and the reason it's unfairly  
25 prejudicial, is because I'm not going to vouch for these two

1 guys credibility and reliability, and I certainly don't  
2 think --

3 THE COURT: Which two guys?

4 MR. DAVIS: McCants and Handy. And I'm certain the  
5 United States isn't. And what they're saying is misleading.  
6 And it's just their interpretation of all of this. And  
7 they're just sitting there shooting the breeze with each  
8 other, and I'm getting dragged into this. And I may not even  
9 have necessarily been involved with them. Nobody's -- I mean,  
10 Mr. Brown does not appear on this tape. It's unfairly  
11 prejudicial. And it is more than a little bit cumulative.

12 The jury will use this as evidence. It's not  
13 evidence. The United States is going to present evidence.  
14 This is just a pile of mish mash that's being thrown on that  
15 will only confuse the jury, mislead them, and what little bit  
16 of it is accurate is going to be cumulative to the real  
17 evidence. They have text messages, they have the testimony of  
18 Cornish. They probably have Deandre coming -- Dre coming in  
19 to testify. We don't need this. At least Mr. Brown doesn't.  
20 And I think it's unfairly prejudicial to bring it in.

21 At the heart of all of this is reliability and I  
22 just don't think this is a good --

23 THE COURT: Well, I think that's actually what your  
24 point is, for everything that's just been said, Mr. Davis, I  
25 think that you're -- I'm not sure -- you're no longer making

1 an 801(d)(2)(E) argument. At least you shouldn't be. That's  
2 over for purposes of our conversation. Your argument on 403,  
3 I think the government has the stronger argument on that too,  
4 if it is what they say it is. And then I think what your real  
5 problem with is it is you're saying, but what is it? It's  
6 just some guys talking about some stuff that they might have  
7 heard from their lawyers or in the discovery or whatever.  
8 It's not -- you're saying it isn't -- it doesn't have sort of  
9 a separate reliability to it.

10 MR. DAVIS: Most of it's in the indictment. And  
11 what's not in the indictment is in the discovery.

12 THE COURT: All right. I think that tees it up, Mr.  
13 Martinez, so --

14 MR. DAVIS: I'm not going to concede these  
15 statements are in furtherance of the conspiracy. Because I  
16 think this is a rehash. It's reckless. I do not think that  
17 these are in furtherance of the conspiracy. And when you look  
18 at the reliability goes directly to the probative value of the  
19 evidence. I mean, that's -- I mean that's what we're doing  
20 here. We're balancing unfair prejudice --

21 THE COURT: Fair enough. I am interested in the  
22 last, and only the last piece of your argument here. What's  
23 new in this?

24 MR. MARTINEZ: You know what's new, Your Honor,  
25 what's not in the discovery or the indictment, the line where

1 Handy says, Eggy probably --

2 THE COURT: Point it to me physically so I can read  
3 along, last page.

4 MR. MARTINEZ: Sorry, I've got to find the right  
5 transcript. Yeah, it's the last page the first block during  
6 which Handy is talking. "Eggy probably telling on yo. That's  
7 what he said he keep worrying about." That's a statement by  
8 Mr. Brown. That's nowhere in the discovery. That's nowhere  
9 in the indictment.

10 THE COURT: Okay. That's Handy's purporting to  
11 claim to know what Brown is worried about, because Brown,  
12 according to Handy, told Handy that that's what he's worried  
13 about.

14 MR. MARTINEZ: Yes and while --

15 THE COURT: He's worried about --

16 MR. MARTINEZ: Eggy telling.

17 THE COURT: Eggy telling.

18 MR. MARTINEZ: And we got to keep in mind, this is  
19 in the context of a witness murder that Mr. Brown committed to  
20 benefit Mr. Handy. And so, of course, they're going to have  
21 discussions about what the exposure is with respect to this  
22 and who the witnesses are going to be. But this is important,  
23 this is Mr. Brown's own statement. And while Mr. Brown may be  
24 entitled not to have the jury consider statements to the  
25 effect of, I might take a plea, I want to negotiate all the

1 way down to 15, this is not that kind of statement. This is  
2 Mr. Brown talking about what snitches he's worried about.

3 So then later, at the very last line, when they're  
4 talking about whether or not Deandre is telling, Wes said the  
5 N-word that Eggy gave the joint to telling on him. None of  
6 that's in the discovery. That is not cumulative. This  
7 recorded conversation is the only source of that information.  
8 So that's more than sufficient to defeat any Rule 403  
9 argument. And this is enormously probative to the extent that  
10 when James Cornish gets on the witness stand and is  
11 cross-examined about all the motives Mr. Davis just referred  
12 to about why he may have been cooperating with law enforcement  
13 and whether he can be trusted, these statements by Mr. Brown  
14 himself corroborate Mr. Cornish and build his credibility --

15 THE COURT: Mr. Davis, have you got anything  
16 specifically on the middle of that big block, in the very last  
17 line, to indicate that that was commonly known, it's in the  
18 discovery, "Eggy probably telling on him, yo, that's what  
19 he -- i.e. Brown -- said he keep worrying about." And then  
20 bottom of that transcript, "Wes said the N word that Eggy gave  
21 the joint to telling on him."

22 MR. DAVIS: Eggy gave the joint to, that would be  
23 Dre, that would be Deandre. I believe that --

24 THE COURT: Wes said that -- Wes said that Dre's  
25 telling on him. That's the interpretation?

1 MR. MARTINEZ: Yes, Your Honor.

2 THE COURT: Yeah.

3 MR. MARTINEZ: That's the defendant's statement as  
4 reflected in this transcript.

5 MR. DAVIS: And I believe that Mr. Cornish addresses  
6 both Eggy and Dre in his videotaped statement, I believe.

7 MR. MARTINEZ: But Mr. Cornish cannot testify as to  
8 what the defendant said, this statement is a vehicle for  
9 that.

10 MR. DAVIS: See therein lies the hitch, because what  
11 we've heard over the past five minutes is this is Brown's  
12 statement. I can see this being hammered away to the jury.  
13 And if the United States is standing up and they're vouching  
14 for the credibility and reliability of Mr. McCants and Mr.  
15 Handy, I -- I would be shocked. I would be absolutely  
16 shocked. And to allow -- to allow this to come in in that  
17 context, under these circumstances, I think the reliability of  
18 these two men under these circumstances, and the fact that  
19 they know most of this information from beforehand, I think  
20 that undercuts the probative value. Mr. Brown is not making  
21 any of these statements and it just -- it just undercuts -- it  
22 undercuts the probative value of these statements.

23 THE COURT: The law -- the law punishes joining a  
24 conspiracy. I don't mean it just gives you five years for a  
25 371, I mean it punishes you, procedurally, it does.

MR. DAVIS: And you look at Mr. Cornish and Mr. Cornish's videotaped statement that Mr. Brown saw when he went to the state trial about how Eggie got the gun and how Dre had got the gun. And now he's being reprosecuted for the same murder, for him to believe that Eggie is testifying against him, plus Eggie is in the indictment. And I don't recall if Dre is in the indictment.

MR. MARTINEZ: Eggys name is not in the indictment, nor is Dre's.

MR. DAVIS: Well, they're in the discovery and they're in Mr. Cornish's videotaped statement.

Well, Your Honor, we'd submit No. 1 he withdrew from the conspiracy. No. 2 these statements are not in furtherance of the conspiracy because the United States is not arguing this is furthering any aspect of this conspiracy. They're arguing this is evidence of guilt. That he said it and it's evidence of guilt. And that's not the case. This is evidence of these two guys in there. And it's misleading and it's cumulative of the actual evidence they're going to introduce, because they're probably going to produce Deandre. They're probably going to produce Eggie. Eggie is Mr. Cornish's brother. They're going to produce Mr. Cornish. This is cumulative. It's misleading. And it's not reliable and we ask Your Honor to exclude it.

THE COURT: Thank you, Mr. Davis. Anybody else want

1 to be heard on that? Mr. Bussard.

2 MR. BUSSARD: Thank you, Your Honor. As I mentioned  
3 in my motion, we're in a little bit of a dilemma, there are  
4 portions of these calls that -- and I can do this briefly,  
5 Your Honor -- that impact Mr. Jones, maybe tangentially  
6 because of what the discussion is going on. But there is a  
7 segment that clearly, and the government presented it to me in  
8 the form of a *Brady* disclosure, that helps him. So I stand  
9 here today actually wanting portions of this to be played for  
10 the jury. And, in fact, it was played to the Court earlier in  
11 the lead up to the earlier discussion about Mr. Johnson.

12 The -- Mr. Jones is in --

13 THE COURT: So you and the government are --

14 MR. BUSSARD: Only for that statement.

15 THE COURT: Fine. I love peace and harmony in my  
16 courtroom.

17 MR. BUSSARD: I don't know how much more of that  
18 there will, be we'll see. Mr. Jones is in a unique position,  
19 Your Honor, he has not had --

20 THE COURT: So he wants some segments in and some  
21 segments excluded.

22 MR. BUSSARD: Yes, Your Honor. And I can't get  
23 around that. We're not conceding the in furtherance argument.  
24 I think the horse has been beat pretty badly on that. The  
25 403, cumulative, yes, every mention of Mr. Jones, every

1 mention of a potential murder that hasn't been proven yet,  
2 every mention of talking about cooperators, piles on to this  
3 voluminous evidence in discovery that has taken over my  
4 office, because I have the state discovery as well. I have  
5 about a hundred thousand pages total when you pile up all this  
6 stuff. And the fact of the matter is that --

7 THE COURT: I hear you, but these arguments about  
8 prejudice, it's -- you know, a tornado is bad until a  
9 hurricane comes, then the tornado gets overtaken by the  
10 hurricane. The tornado evaluated against the hurricane, it's  
11 not so significant anymore.

12 MR. BUSSARD: I realize that, Your Honor.

13 THE COURT: You try a tornado by itself, yeah, by  
14 itself, big deal big prejudice. In the context of a lengthy  
15 trial that is evidently going to be about murder after murder  
16 after murder, the prejudicial side of this that you're arguing  
17 it loses some of its bite.

18 MR. BUSSARD: Understand. Can I address an issue --

19 THE COURT: Absolutely.

20 MR. BUSSARD: -- brought up. The Court started this  
21 segment of the motions hearing by asking what are the  
22 potential options. And, obviously, one of the options is  
23 severance, the other is redaction of part of this.

24 THE COURT: We're already redacting the part about  
25 the Brown plea agreement.

MR. BUSSARD: At a minimum, Your Honor, I am asking that a very firm limiting instruction be given. And I wanted to include the fact that Mr. Jones neither condoned, affirmed, or participated in this conversation in any way, that this is only between two other people --

THE COURT: Why do you get that limiting instruction in the context of the law on co-conspirator statements? All for one, one for all.

MR. BUSSARD: It is --

THE COURT: It's -- the law treats it as his statement, not a law I wrote.

MR. BUSSARD: I understand that. It is just extremely frustrating when Mr. Jones, of all people, can't even defend himself or go in there and say, but you all don't have it right. You know, and they force him to get on the stand. And that's the prejudice that we have here, that how else do I rebut something, like he's telling for instance, the statements in here that Slay may be telling. That's a lawyer just speculating, I think, on who may or may not be cooperating. That doesn't bother me that much. But it does bother me when they are attributing certain things to Mr. Jones potentially that he can't even --

THE COURT: All right. What? Help me, focus my attention.

MR. BUSSARD: Well, that goes back to the portion

1 that I really want in --

2 THE COURT: Well, I can't help you with that.

3 MR. BUSSARD: And I guess I have to ask you --

4 THE COURT: You have to choose. You're going to  
5 have to argue, Mr. Bussard, whether you want that segment in  
6 or you don't want that segment in, you can't --

7 MR. BUSSARD: Your Honor, from Mr. Jones's point of  
8 view we want that segment in.

9 THE COURT: Well, then you can't argue that it  
10 should be excluded and I don't think you have anything else to  
11 say.

12 MR. BUSSARD: Fair enough.

13 THE COURT: I mean --

14 MR. BUSSARD: -- redact, I'm just asking the Court  
15 to consider redaction --

16 THE COURT: Tell me exactly what redaction you  
17 want.

18 MR. BUSSARD: There is --

19 THE COURT: You told me you weren't that worried  
20 about the Slay may be telling.

21 MR. BUSSARD: There are in the -- Court's indulgence  
22 for a moment. Your Honor I think I would agree with  
23 everything except one particular portion, and it doesn't -- it  
24 references, from the government's motion to admit the  
25 statements, it is on the June -- the September 26th, 2017,

1 there is a discussion about Mr. Cornish and --

2 THE COURT: Hold on, on the 26th, you've got to give  
3 me a page.

4 MR. BUSSARD: Mr. Cornish, it's probably the -- the  
5 front page.

6 THE COURT: The front page.

7 MR. BUSSARD: Front page, it's down at the bottom of  
8 page 1 of September 26th, there's some talk about --

9 THE COURT: He said James Cornish telling for sure,  
10 everybody know that. Who the F name he say?

11 MR. BUSSARD: There was no secret that Mr. Cornish,  
12 also known as Nod, was testifying.

13 THE COURT: Yes. You say Cornish telling. He told  
14 you off the break. I ain't going to lie.

15 MR. BUSSARD: And then it goes on in the next  
16 segment, the 26:58 segment on page 2. There is a reference.

17 THE COURT: 26:58, 36:35?

18 MR. BUSSARD: Yes. There is a reference to Ronnie,  
19 do you see that in the first --

20 THE COURT: Oh, yeah, you been talking to Ronnie.  
21 Punk ass, he was supposed to send some money too. Okay. Now  
22 what?

23 MR. BUSSARD: And this is going to come up next  
24 week, Your Honor, at the motions hearing. However, the  
25 government intends to, I believe, introduce Youtube videos and

1 what have you --

2 THE COURT: Yes.

3 MR. BUSSARD: And this is the same kind of argument  
4 that I just put forth a couple minutes ago that Mr. Jones has  
5 no control over. They are people talking about him, putting  
6 things up on Facebook, that he can't even respond to, what the  
7 government placed in the response was the -- or their motion,  
8 was that when Mr. Jones was convicted in state court,  
9 everybody started talking about allegedly disposing of  
10 cooperators, people, snitches and what have you. That's a  
11 danger to Mr. Jones, because he didn't call these people and  
12 say, put this all up on Facebook about what happened to me  
13 over here. It's just people on their own initiative taking  
14 those steps. That's my concern.

15 THE COURT: Yes, but if it's -- was it done during  
16 the life of the conspiracy? Was it done in furtherance of the  
17 conspiracy? If so, and if it's -- unless you have some  
18 argument that it's not foreseeable to him, it's all admissible  
19 against him.

20 MR. BUSSARD: As that, but then the Court has to get  
21 through 403. I'm still asserting that it is prejudicial to  
22 Mr. Jones, because obviously he didn't say it, but obviously  
23 he didn't even encourage, do anything to have these statements  
24 be made --

25 THE COURT: But he's in the gang, and he is the --

1 he's the putative beneficiary of it. All right. I've got the  
2 argument, Mr. Bussard.

3 MR. BUSSARD: That's it.

4 THE COURT: I've got it. I think a lot of the  
5 arguments that are being made are understandable frustrations  
6 from defense lawyers about the circumstances they find  
7 themselves in when facing a wide-ranging racketeering  
8 conspiracy charge, and the scope of it is quite broad, and not  
9 all conspirators are going to be shown to have been involved  
10 in all aspects of the conspiracy. But that's garden variety  
11 conspiracy trial. That's what happens.

12 And that doesn't give rise to 403 problems, unfair  
13 prejudice problems in this context, anymore than it does in so  
14 many other conspiracy cases tried in this courthouse, with  
15 similar problems, where there is not equity or parity between  
16 the proof that's offered against different members of the  
17 conspiracy. And, you know, takes me right back to the jury  
18 instruction on conspiracy, what we tell jurors, which is that  
19 some conspirators may be deeply involved and some may be only  
20 minimally involved. But if you're in the agreement, you're in  
21 it. If you're not, you're not.

22 All right. What else have we got? Somebody else --  
23 Mr. Enzinna.

24 MR. ENZINNA: Your Honor, I apologize, I don't want  
25 to rehash my argument, but I do want to make clear, I don't

1 think I was very clear about specifically what relief we were  
2 asking for on Mr. Johnson's behalf.

3 THE COURT: Okay.

4 MR. ENZINNA: What relief we're asking for is the  
5 redaction of one word, and that is his name at the end of that  
6 where he says --

7 THE COURT: The J or the Geezy or what?

8 MR. ENZINNA: Where he says, Geezy, he in all that  
9 type of stuff. And I think we're both clear on our positions  
10 on whether it's in furtherance. But under Rule 403 the  
11 question is weigh the probative value against the prejudice,  
12 the prejudice is pretty clear. The probative value, he says,  
13 we ain't been together in years. Then he says, Geezy's in all  
14 that type of stuff. Then he says again, we ain't been  
15 together for so long. I can't say anything. Now, if I could  
16 cross-examine Mr. McCants, I could point that out to the jury  
17 and say you said Mr. Johnson is in all this stuff, but seconds  
18 before that you said you haven't been together in years, and  
19 after that you say the same thing.

20 And furthermore, I think it's cumulative evidence.  
21 I mean, the question is whether or not Mr. Johnson is a member  
22 of BGF. The government is going to be putting on --

23 THE COURT: Well, you can certainly still -- you may  
24 not be able to conduct the cross-examine that you would like  
25 to, but you can certainly argue, based on how the evidence is

1 presented, that --

2 MR. ENZINNA: Sure.

3 THE COURT: -- it doesn't -- this doesn't prove what  
4 the government says it proves. You're not being blocked from  
5 that. And, you know, counsel are permitted to certainly argue  
6 their inferences.

7 MR. ENZINNA: But my point is under 403 that goes to  
8 the probative value, which is certainly lessened. And in  
9 addition it's cumulative, because the government's going to be  
10 putting on videotapes, pictures of tattoos, witnesses,  
11 evidence and evidence and evidence of who belongs to BGF.  
12 This is really not necessary evidence. It's cumulative. And  
13 under 403 I don't think it ought to come in.

14 THE COURT: Thank you, Mr. Enzinna.

15 All right. Anything else?

16 MR. FRANCOMANO: Yes, Your Honor. I do have to  
17 address the 26th conversation by Mr. McCants. Your Honor, as  
18 I stated before, there is no way to know that this even  
19 happened. There is no records of any shooting going on.  
20 There's no records, 911 tape saying that this happened at  
21 supposedly Mr. Ronnie Hall's home. Your Honor, in listening  
22 to the actual tape, it doesn't -- I'm hearing Ronald, not  
23 Ronnie, Your Honor. And that's on page 2 where it says  
24 McCants says you been talking to Ronnie. And I'm hearing  
25 Ronald.

1 THE COURT: How about Rondo.

2 MR. FRANCOMANO: Your Honor, whether or not Rondo,  
3 they still have to link Rondo to Ronnie Hall. And I think  
4 he's saying Ronald, who is not Ronnie Hall. So at this point  
5 Your Honor, there's just nothing to link this conversation to  
6 an actual real event. The government's trying to say, well,  
7 Mike Tillman was murdered. The alleged facts that Mr. McCants  
8 puts forth are nothing like this murder that took place with  
9 Mr. Michael Tillman. Thank you, Your Honor.

10 THE COURT: Thank you, Mr. Francomano.

11 And to the extent that the Court, in its written  
12 ruling later today or early next week, permits this, it's  
13 going to be always with the -- it's always with the caveat  
14 that it's subject to being connected up by the government  
15 during their case in chief. The government has to prove the  
16 underlying conspiracy that supports all of this. And if they  
17 don't, at Rule 29 time, then the arguments that the defendants  
18 have made energetically today will undoubtedly be presented  
19 again. And they will be evaluated then in the context of,  
20 well, what was the predicate conspiracy ever actually proven.  
21 And the Court will revisit it. This is the first round of  
22 whether the government gets to try to before the jury.

23 All right. Anything -- Mr. Solomon.

24 MR. SOLOMON: Can we just make it clear that unless  
25 otherwise stated, even those defendants who are silent are

1 joining in on all the motions that are being presented to the  
2 Court.

3 THE COURT: All five defendants today, present in  
4 court, are understood to object to the admission of these two  
5 pieces of evidence, the recordings from September 25 and  
6 September 26th, from the FBI bug that was surreptitiously  
7 placed inside of the Super -- not Supermax, but Chesapeake  
8 Detention Facility, on the basis that they were -- that  
9 they're not properly admitted co-conspirator statements.

10 MR. SOLOMON: Thank you.

11 THE COURT: And that if they are, they nonetheless  
12 should be excluded by application of the Rule 403 probative  
13 prejudice balancing test.

14 MR. SOLOMON: Thank you.

15 THE COURT: Anything else from the defense side?  
16 All right. So our next hearing is on Tuesday, which is the  
17 pretrial conference in the case, where we have a lot of  
18 housekeeping matters to address, but also some motions in  
19 limine that were presented by the deadline. Has the  
20 government responded to the motions in limine yet?

21 MR. MARTINEZ: Yes, Your Honor, we made our  
22 submission on Tuesday evening.

23 THE COURT: Okay. So how many motions in limine are  
24 there about?

25 MR. MARTINEZ: Quite a few. I don't have them all

1 in front of me, but in the department of ten.

2 THE COURT: So we've got like videotapes --

3 MR. MARTINEZ: There's one addressing rap videos.

4 One addressing co-defendants' guilty pleas. Several  
5 addressing whether text messages can be authenticated.  
6 Several addressing the admissibility of ballistics evidence.  
7 And then several, which candidly are just relitigation of Mr.  
8 McCants's efforts at the prior motions hearing. And there's  
9 our motion on forfeiture by wrongdoing and we submitted three  
10 others.

11 THE COURT: Oh, yes, what they can argue and so  
12 forth. There was one thing on my mind, but it must not have  
13 been that important.

14 All right. The defendants are remanded to the  
15 custody of the Marshal. Counsel are excused. We'll reconvene  
16 next Tuesday in the pretrial conference. Thank you, everyone.

17 (The proceedings were concluded.)

18 I, Christine Asif, RPR, FCRR, do hereby certify that  
19 the foregoing is a correct transcript from the stenographic  
record of proceedings in the above-entitled matter.

20 \_\_\_\_\_/s/\_\_\_\_\_  
21 Christine T. Asif  
22 Official Court Reporter  
23  
24  
25

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